Office Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Respondents.

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GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR GRACE LINE *et al.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Respondents.

No. 252.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

BRIEF FOR GRACE LINE *et al.*

The case is here on writs of certiorari to the United States Court of Appeals for the Second Circuit.

The respondents, cross-petitioners Grace Line, Inc. *et al.* on whose behalf this brief is filed, will hereinafter be referred to as "plaintiffs." The petitioner, cross-respondent Panama Canal Company, will hereinafter be referred to as "defendant."

Emphasis has been added except where otherwise noted.

Questions Presented.

The primary questions are numbered; the incidental and subsidiary questions on which the answers to the primary questions depend follow them.

1. Did defendant unlawfully withhold and unreasonably delay the prescription of reduced tolls?

   (a) Do Sections 411 and 412, Title 2, of the Canal Zone Code, as amended by the Act of September 26, 1950, require that tolls be prescribed on the basis of Canal operations only and without regard to the losses of defendant's collateral activities, activities which serve the Armed Forces, the Republic of Panama and the public as well as the Canal?

   (b) Does the Hay-Pauncefote Treaty require that tolls be prescribed on the basis of Canal operations only?

   (c) Do the Canal's operating results call for the prescription of reduced tolls?

   (d) Did the duty to prescribe tolls in accordance with Sections 411 and 412 take effect upon the transfer of the Canal to defendant, or, does it take effect at defendant's pleasure?

2. The defendant having unlawfully withheld and unreasonably delayed the prescription of reduced tolls, did the

District Court have jurisdiction to grant a mandatory injunction to require such prescription?

(a) Did the District Court have jurisdiction over plaintiffs' claim under 28 U. S. C. §1331?

(b) May plaintiffs' claim be enforced against defendant in its capacities (1) as a corporation subject to suit and (2) as an agency of the United States, under case law and the Administrative Procedure Act?

(c) Do statutes preclude judicial scrutiny of defendant's unlawful failure to act?

(d) Does the review power of the President mean that he should "take Care" that Section 412 be "faithfully executed" by defendant in prescribing tolls, and, if so, is the premise false upon which defendant invokes the doctrine of *Chicago & Southern Airlines* v. *Waterman SS. Corp.*, 333 U. S. 103, in its argument that the District Court lacked jurisdiction?

(e) Did the District Court have jurisdiction whatever the review power of the President may be interpreted to mean?

(f) May a District Court other than the District Court for the District of Columbia grant a mandatory injunction against a government corporation fully subject to suit?

(g) Are miscellaneous excuses offered by defendant valid?

(h) Do the plaintiffs have standing to sue under general principles of law, the Administrative Procedure Act and the Hay-Pauncefote Treaty?

(i) Did the Court of Appeals properly direct the entry of summary judgment?

(j) If and to the extent that an order of the President embodies an error of law, is it subject to judicial review?

3. Is defendant liable to plaintiffs and their class for the damages caused by its unlawful and unreasonable failure to act?

(a) Is there an adequate basis for the calculation of damages?

(b) Did Congress intend that defendant be liable for overcharges?

Statement of the Case.

The Complaint.

The action was brought by twelve U. S. flag shipping companies as a class action under Rule 23 (a) (3), on behalf of all users of the Panama Canal. Subsequently a number of other U. S. flag shipping companies intervened (R. 1-9).

Plaintiff sought (1) to compel defendant to prescribe tolls on the basis of Canal operations only, and without regard to the losses of the "business" or "collateral activities," as required by Section 412, Title 2, of the Canal Zone Code as amended by the Act of September 26, 1950 (Public Law 841, 81st Cong., 2d Sess.), and (2) to recover damages for its past failure to do so (R. 8-9).

Plaintiffs' grievance against defendant is in substance this: that on July 1, 1951 it became defendant's duty to prescribe tolls according to a formula defined by law; that in essence this formula provided that tolls should cover only the interest on the capital invested in the Canal and costs of operation; that it wholly failed and neglected to

prescribe tolls accordingly; that it "concealed" by "ambiguous bookkeeping"* the facts which would have made its failure known to plaintiffs and the public; that meanwhile, according to the computations of the Government's own accountants, the General Accounting Office, defendant has been and is collecting tolls in excess of the lawful formula at the rate of approximately $25,000 a day, of which about $4,000 a day has been and is being paid by the twelve original plaintiffs; that, as found by GAO, the excess collections for the first three years to June 30, 1954 were $27,836,504; and that the excess collections have since continued at at least the same rate.

The Theory of the Complaint.

The theory of the complaint is that:

(1) The right to grant mandatory relief and damages is rested on general principles of law and Section 10 of the Administrative Procedure Act. Case law and the Administrative Procedure Act authorize "any court of competent jurisdiction" to compel corporation and also "agency action unlawfully withheld or unreasonably delayed" in "any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction)." Case law also establishes the authority of the courts to award damages suffered by reason of breach of statutory duty.

(2) Defendant's liability to suit is declared by Section 248, Title 2, of the Canal Zone Code as enacted by the Act of June 29, 1948, creating defendant and providing that defendant

"(d) May sue and be sued in its corporate name."

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* Quoted from the Court of Appeals (R. 249).

Section 245, also so enacted, provides that:

> "Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant and resident both of the southern judicial district of New York and the Canal Zone."

(3) Jurisdiction exists under Section 1331, Title 28, of the United States Code vesting in the district courts jurisdiction of cases arising "under the Constitution, laws or treaties of the United States."

(4) Defendant's duty to prescribe tolls is defined by Section 412. Authority to do so is granted by Section 411. These Sections are discussed at length *infra* pp. 79-84.

(5) The rate has been excessive to the extent of 25% or about $25,000 a day as shown by the General Accounting Office audit report for 1954. Of particular relevance is the table appearing at p. 13 of that report (R. 32) and reproduced at p. 55 of this brief showing defendant's operating results from July 1, 1951 to June 30, 1954 broken down as between Canal operation and the collateral activities.

The Proceedings.

The complaint was filed September 13, 1955 (R. 1).

On October 28, 1955 Judge Edelstein granted an order to show cause why summary judgment should not be granted in plaintiffs' favor (R. 10-12). Plaintiffs also commenced discovery proceedings chiefly to secure a copy of an opinion by defendant's General Counsel reported to support plaintiffs' position (R. 1-2). Cf. *infra* pp. 42-43.

On December 16, 1955 defendant served a notice of a motion to dismiss the complaint under Rules 12(b)(1) and (7) of the Rules of Civil Procedure (R. 185).

On December 19, 1955 Judge Walsh granted an order to show cause, returnable the following morning, why plaintiffs' discovery proceedings should not be stayed until after the decision on defendant's motion to dismiss (R. 209). In the argument in this brief the expression the "District Judge" refers to Judge Walsh.*

Judge Walsh made a temporary order staying the discovery proceedings on December 22, 1955 and continued it on January 4, 1956 (R. 209-210; 212-213).

Defendant's motion to dismiss was argued before Judge Walsh December 29, 1955 (R. 206, 211).

By an order filed on June 29, 1956 Judge Walsh sustained the motion and dismissed the complaint (R. 234).

Plaintiffs took an appeal on July 26, 1956 to the United States Court of Appeals for the Second Circuit (R. 3).

The appeal was argued on November 13 and 14, 1956 (R. 235).

On April 8, 1957 the Court of Appeals reversed the District Court and directed the entry of summary judgment requiring defendant to prescribe tolls without regard to the losses of the collateral activities. The Court held plaintiffs not entitled to relief for past damages (R. 235-237).

On May 1, 1957 the Court of Appeals denied defendant's application for a stay pending its petition to this Court for certiorari (R. 259).

On May 7, 1957 Mr. Justice Harlan granted such a stay (R. 262).

Both parties filed petitions for certiorari on July 6, 1957.

This Court granted writs of certiorari on October 14, 1957.

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* In late 1957 Judge Walsh resigned to become Deputy Attorney-General of the United States.

Facts.

Events prior to the transfer of the Canal July 1, 1951.

The following statement of facts is intended to give a brief general picture. More detailed statements of fact relevant to particular controversial issues will be made in various points argued.

The Panama Canal has a long history. As far back as 1551 the Spanish historian de Gomara demanded of Philip II that he build a canal at Panama "without delay."

The events relevant to this litigation may be said to have begun shortly after 1848, the year in which the Mexican cession, effected by the Treaty of Guadalupe Hidalgo, and the discovery of gold at Sutter's Fort enormously stimulated interest in California and in ways of getting there.

The organization of the Panama Railroad Company. On April 7, 1849 the New York Legislature created a corporation called the "Panama Railroad Company" (Ch. 284, Laws of 1849).

As defendant's name prior to July 1, 1951 was also "Panama Railroad Company" we shall in the interest of clarity refer to this corporation created in 1849 as "Panama Railroad Company (the New York company)."

The Panama Railroad Company (the New York company) was organized by New York businessmen to build a railroad across the Isthmus of Panama. The railroad was completed in 1855.

The Clayton-Bulwer Treaty; canal rates to be "just and equitable." On April 19, 1850 the Governments of the United States and Great Britain concluded the Clayton-Bulwer Treaty. Canal Zone Code, p. 833. By this Treaty

each Government undertook (Article I, pp. 833-834) not "to obtain or maintain for itself any exclusive control over the said ship canal," referring to a ship canal between the Atlantic and Pacific Oceans through Central America, and not to fortify either the canal or any part of Central America. The Governments (Article V, p. 835) further agreed to protect any private canal or railway enterprise on condition that it impose (Article VIII, p. 836) no "charges or other conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable."

The French. In the 1880's French interests commenced an attempt to dig a canal at Panama. In connection with this enterprise the French acquired 68,888 of the 70,000 shares of the Panama Railroad Company (the New York company). The French effort had definitely failed by the early 1890's, but the French continued to own and operate the Panama Railroad Company (the New York company).

The United States repeatedly declares its policy that an interoceanic canal should be for the benefit of world commerce at reasonable tolls, and not for the selfish advantage of any nation. During the 19th century the question of an interoceanic canal across Central America was often agitated. In 1826 Secretary of State Henry Clay said in his instructions to the delegates to the Panama Congress (IV, *Proceedings of International American Conference*, 144):

> "[If a canal across the Isthmus be opened] so as to admit of the passage of sea vessels from ocean to ocean, the benef[it] of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation for reasonable tolls."

Declarations to the same general effect were made by Secretary of State Lewis Cass in a message to Great Britain

in 1857,[1] by Secretary of State James G. Blaine in instructions to Minister James Russell Lowell in 1881,[2] and by President Cleveland in his annual message of 1885.[3] The concept had, of course, also been embodied in Article VIII of the Clayton-Bulwer Treaty.

The Hay-Pauncefote Treaty; canal rates to be "just and equitable." The Spanish-American War persuaded American public opinion that the need for an interoceanic canal was urgent for national defense quite apart from commercial benefit. The Clayton-Bulwer Treaty stood in the way of a purely American enterprise. This difficulty was removed by the negotiation of the Hay-Pauncefote Treaty, concluded November 18, 1901. 32 Stat. 1903. The Hay-Pauncefote Treaty superseded the Clayton-Bulwer Treaty (Article I) and authorized the construction and control of a canal by the United States Government (Article II).

Article III of the Treaty provided as follows:

> "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> "1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that

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[1] Quoted at 46 Cong Rec. 1821 ("The United States, as I have before had occasion to assure your Lordship [Palmerston], demand no exclusive privileges . . .").

[2] *Foreign Relations of the United States—1881,* pp. 537-538 ("The United States [does not] seek any exclusive privileges . . .").

[3] 3 Moore, *International Law Digest,* 199 (". . . the wisdom and foresight of those earlier administrations . . . consecrated [an interoceanic canal] in advance to the common use of mankind by their positive declarations and through the formal obligations of treaties").

> there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

The anti-discrimination provision and the remaining rules of Article III were drawn from the Constantinople Convention of 1888. The requirement that "conditions and charges of traffic shall be just and equitable" was inserted at the request of Lord Lansdowne, the British Foreign Minister. The similarity in phraseology indicates that he took these words from Article VIII of the Clayton-Bulwer Treaty.*. There is no similar provision in the Constantinople Convention.† The only tolls limitation applicable to the Suez Canal Company was provided by Article XVII, 3d of the concession granted on January 5, 1856 to Ferdinand de Lesseps by Khedive Mohammed Said.

The United States acquires the Canal Zone and the Panama Railroad Company (the New York company) and builds the Canal on a "mandate from civilization." The Act of June 28, 1902 (32 Stat. 481) provided for the construction of the Panama Canal by the United States Government. *Inter alia* this Act authorized the President to buy

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* According to the State Department's history of the negotiations (Document No. 746, 61st Cong. 3d Sess. 9):

> "One other amendment proposed by Lord Lansdowne was regarded by the President as so entirely reasonable that it was agreed to without discussion. This was the insertion at the end of clause 1 of Article III of the words, 'Such conditions and charges of traffic shall be just and equitable.' . . ."

† The Constantinople Convention was actually negotiated by an *ad hoc* international commission which met in Paris March 30-June 13, 1885. The British representative on this commission was Sir Julian Pauncefote, who later as Lord Pauncefote and British Ambassador to the United States, signed the Treaty that bears his name. Hallberg, *Suez Canal*, 286-287.

out the French for $40,000,000. In order to get access to the Isthmus of Panama it was necessary, however, to obtain the permission of the sovereign of that territory, at that time the Republic of Colombia. Colombia insisted upon terms which the United States regarded as extortionate and an impasse was reached.

At this point, on November 3, 1903, the inhabitants of the Isthmus revolted, asserted their independence and organized the Republic of Panama. On November 18, 1903 the United States concluded a treaty with Panama, the Hay-Bunau Varilla Treaty (33 Stat. 2234). By this Treaty Panama ceded a Zone to the United States for the construction of a canal.

In answer to criticism that the United States was unduly sympathetic to the Panamanian revolt President Roosevelt asserted that we had gone into the Isthmus by virtue of a "mandate from civilization."*

That the United States was obligated by Treaty to serve ships of all nations at reasonable tolls dispelled the cynicism with which the world might otherwise have received President Roosevelt's statement.

Several years later Senator Elihu Root had occasion to describe the responsibilities of the United States respecting the Canal in a speech on the floor of the Senate on January 21, 1913. The occasion was the controversy over tolls on coastwise traffic to which reference is made *infra* p. 83. Congress later adopted the measure which Senator Root advocated in this speech, the Act of June 15, 1914, *infra* p. 83; Appendix B, 11a. Referring to the statements by President Roosevelt and earlier statesmen, he said (46 Cong. Rec. 1822):

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* 3 Moore, *International Law Digest*, 75 (special message of January 4, 1904).

"We base our title upon the right of mankind in the Isthmus, treaty or no treaty. We have long asserted, beginning with Secretary Cass, that the nations of Central America had no right to debar the world from its right of passage across the Isthmus. Upon that view, in the words which I have quoted from President Roosevelt's message to Congress, we base the justice of our entire action upon the Isthmus which resulted in our having the Canal Zone. We could not have taken it for our selfish interest; we could not have taken it for the purpose of securing an advantage to the people of the United States over the other peoples of the world; *it was only because civilization had its rights to passage across the Isthmus and because we made ourselves the mandatory of civilization to assert those rights that we are entitled to be there at all.*"

In 1904 President Roosevelt acquired from the French their assets and properties in the Isthmus of Panama, including the 68,888 shares in the Panama Railroad Company (the New York company). In 1905 the Government acquired the remaining 1,112 shares.

Between 1904 and 1914 the United States built the Canal through an agency known as the "Isthmian Commission."

The administration of the Zone, the Canal and the Panama Railroad Company (the New York company) from 1912 to 1951. When the Canal was approaching completion Congress adopted the Act of August 24, 1912, the "Panama Canal Act" (37 Stat. 560). This Act provided for the operation of the Canal and the administration of the Zone by a "Governor" appointed by the President. This agency was never incorporated and was known as "The Panama Canal" or the "unincorporated agency".

The Canal Zone was heavily fortified. Large units of the Armed Forces were stationed there, not only for the

protection of the Canal, but also for training, particularly jungle training. These units and their dependents came to constitute more than half the population of the Zone.

The Panama Railroad Company (the New York company) continued to operate its railroad; in the course of years, and in connection with French canal construction and American construction and operation and the needs of the Armed Forces, the Republic of Panama and the public, it acquired a steamship line, docks, coaling plants, commissaries, dry and cold storage plants, hotels and various other properties.

The activities of the Panama Railroad Company (the New York company) were commonly called the "business activities" to distinguish them from Canal Zone administration and Canal operation by the Governor of The Panama Canal. These activities were also called the "collateral activities"; the two expressions are used interchangeably in this brief.

The Panama Railroad Company (the New York company) was always subject to suit in connection with its activities; in fact it was a most active litigant; cf. *infra* p. 90.

The Panama Railroad Company (the New York company) becomes a United States corporation fully subject to suit (Act of June 29, 1948). In 1945 Congress adopted the Government Corporation Control Act, 59 Stat. 597, 602; 31 U. S. C. §841-871. That Act (31 U. S. C. §869) forbade the continuance, after June 30, 1948, of any "wholly owned Government corporation created by or under the laws of any State, Territory, or possession of the United States." It therefore became necessary to reorganize the Panama Railroad Company (the New York company) before June 30, 1948. This reorganization was effected by the Act of June 29, 1948 (Public Law 808, 80th Cong., 2d Sess.) 62 Stat. 1075.

This statute created defendant by appropriate amendments to the Canal Zone Code. As noted *supra* p. 5 the Act provided that defendant should be subject to suit. Other provisions of the Act of June 29, 1948 will be noted where relevant in the argument *infra*.

Defendant appears to have carried on its activities without material change from the ways of its predecessor, the New York company of the same name.

During its entire history, up to July 1, 1951, defendant and its predecessor Panama Railroad Company (the New York company) operated the business activities most profitably, and paid large sums in dividends to the United States Treasury, cf. *infra* pp. 65-66.

Under the Act of 1912 the President was "authorized" to prescribe tolls within limits specified by Congress. The tolls statutes prior to the Act of September 26, 1950 are collected in Appendix B, 10a-13a. The last preceding statute was the Act of August 24, 1937, 50 Stat. 750, authorizing tolls per laden ton not to "exceed $1, nor be less than $0.75" (Appendix B, 13a). Pursuant to this Act President Franklin D. Roosevelt had fixed tolls at a rate of 90¢ on August 25, 1937. Federal Register, Year 1937, Volume 2, Part 2, pp. 1764. This rate was in effect in 1948, the year in which began the agitation which led to the enactment of the Act of September 26, 1950.

Congress adopts the Act of September 26, 1950 in order to establish a tolls policy which would allocate against tolls only a fair share of Canal and Canal Zone expense, and properly charge to the Government the costs of national defense. The interpretation of the Act of September 26, 1950 presents major questions in the case. Here we shall state its enactments and briefly outline its history. The various steps in its history will be stated more fully *infra* in connection with the points to which they are relevant.

In March, 1948 the House Appropriations Committee recommended and the President announced an increase in toll rates from 90¢ to $1.00 per laden ton (Appendix I, 42a).

The shipping industry immediately protested. A primary ground of such protest was that tolls were based on costs that should be allocated to national defense. *Infra* pp. 34-35.

On February 28, 1949 the House of Representatives adopted Resolution 44, declaring tolls policy to be the responsibility of Congress and authorizing the Committee on Merchant Marine and Fisheries to conduct a study *"with particular reference to the proper accounting and allocation of costs attributable to"* Canal transits, military activities, civil government and defendant's business operations. Appendix I, pp. 40a-41a; cf. *infra* pp. 35-36.

A subcommittee of the Merchant Marine Committee conducted numerous hearings at which representatives of the shipping industry elaborated their arguments that tolls were charged excessively and made proposals for relief. Cf. Appendix I, pp. 47a-49a.

Because defendant's operations did not affect tolls, in these arguments the shipping industry representatives made no reference to them.

On August 23, 1949 the Merchant Marine Committee reported that it was impossible to fix tolls properly without business type accounts and recommended that the President cause a study to be made of the "organizational aspects of all phases of the Panama Canal." Cf. Appendix I, pp. 43a-44a.

The Bureau of the Budget then made a study which the President submitted to Congress on January 31, 1950. A bill, H.R. 8677, was introduced on May 25, 1950 to carry out its recommendations. After further hearings the bill was adopted and signed by the President on September 26,

1950. The Bureau study and the further hearings are analyzed in detail *infra* pp. 36-40, 69-74.

Principally, the Act:

1. Authorized the President to transfer the Canal (the waterway) to the defendant (Section 10).[1]

2. Renamed the defendant "Panama Canal Company" (Section 5).[2]

3. Left with "The Panama Canal," the unincorporated agency, its governmental functions, and renamed it the "Canal Zone Government" (Section 1).[3]

4. Authorized defendant to fix tolls subject to the approval of the President (Section 11).[4]

5. Directed that tolls be fixed so as to cover the expenses, including interest, of the Canal activity only, and a share of the cost of Canal Zone Government (Section 12).[5]

6. Incorporated Article III, Section 1 of the Hay-Pauncefote Treaty in "bases of tolls" (Section 12).[6]

7. Provided that the Act itself should become "effective" as of the day upon which the President transferred the Canal (Section 14).[7]

Pursuant to the Act the President transferred the Canal to defendant effective July 1, 1951 by Executive Order 10263 (16 F.R. 6333).

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[1] Appendix A, 5a.

[2] Appendix A, 4a-5a.

[3] Appendix A, 4a.

[4] Appendix A, 5a-6a.

[5] Appendix A, 6a-7a.

[6] Appendix A, 7a.

[7] Appendix A, 8a.

Events subsequent to July 1, 1951.

Defendant's custodianship of the Canal since July 1, 1951 has been marked by a sharp increase in traffic and large revenues, primarily from foreign shipping, a failure to obey the statutory command to prescribe tolls, and "ambiguous bookkeeping," in the language of the Court of Appeals (R. 249), referring to financial and accounting omissions, inconsistencies and irregularities described *infra* pp. 60-67.

The increase in tolls is illustrated by comparative figures for the year 1947, after which the Governor recommended an increased rate, the year 1952, the first year of operation of the Canal by defendant, and the years 1956 and 1957. (We supply 1956 figures because defendant's report for 1957 for the first time does not break down tolls between United States and foreign.[4])

	United States Government[1]	United States Private	Foreign	Total[1]
1947[2]	$2,305,787	$ 9,098,339	$ 8,498,363	$19,902,389
1952[3]	3,413,728	9,983,307	17,012,464	30,409,499
1956[3]	1,231,866	10,808,921	25,410,164	37,432,951
1957[4]	1,140,116	not available		39,653,520

[1] Government transits are not paid for, but are recorded at prevailing rates. Under Section 412(c) as enacted by the Act of September 26, 1950 the amounts are credited for tolls-fixing purposes.

[2] Report of the Governor of The Panama Canal for fiscal 1947, pp. 10, 38.

[3] Defendant's report for fiscal 1952, pp. 41, 56; and for fiscal 1956, pp. 47, 63.

[4] Defendant's report for 1957, p. 20.

Until 1957 defendant's reports and those of its predecessor, The Panama Canal, the unincorporated agency, were around 100 pages in length and despite significant omissions respecting the statutory tolls formula, contained many statistical tables and much information concerning operations.

The 1957 report is 28 pages long and contains relatively little information.

As defendant noted in its 1956 report at p. 5, its "operating costs . . . are largely composed of fixed charges which do not vary with business volume."

Anyone who has ever travelled on a toll highway or a toll bridge can appreciate that this statement by defendant is valid.

The direct operating expense of the Canal has indeed varied only slightly. It was as follows for the years referred to (including in all instances the expenses of other marine operations and maintenance and depreciation):

	Canal Direct Operating Expense
1947[1]	$14,369,029
1952[2]	15,286,156
1956[2]	16,138,275
1957	not available

[1] Report of the Governor of The Panama Canal for 1947, p. 131.
[2] Defendant's report for 1952, p. 42; for 1956, p. 47.

The enormous increase in Canal net operating income has been used for dividends ($15,000,000), the absorption of the losses of the "business activities," huge additional administrative expense, acquisition of fixed plant and the like, discussed *infra* pp. 55-57. However to a considerable extent defendant has "concealed" what has happened by "ambiguous bookkeeping," as the Court of Appeals put it (R. 249).

Due to the obscurity of defendant's financial statements the plaintiffs and the public did not know the results of Canal operations until the Comptroller General submitted to Congress on May 16, 1955 his audit report of defendant's affairs for fiscal 1954. It had, however, been apparent for some time that defendant was not applying the statutory

formula. The GAO report is discussed in greater detail, *infra* pp. 53-55.

The contrast with Suez. As noted by the Court of Appeals, the "most comparable waterway" is the Suez Canal. Footnote 33, R. 252. And the Hay-Pauncefote Treaty was substantially modeled on the Constantinople Convention of 1888.

At Suez the post-war increase in traffic has resulted in sharp reductions in rates.

At Suez in 1937, when the Panama rates presently in effect were originally fixed, the toll per laden ton was $1.4833 and $0.7416 per ballast ton. (The toll was officially stated in terms of Egyptian piasters; here we give the dollar equivalents.) At Suez the rate in 1948 was $1.6119 per laden ton; $0.8059 per ton in ballast. In 1950 the rates were reduced to $1.1201 and $0.56, respectively (by reason of devaluation of the Egyptian piaster); in 1951, to $1.0483 and $0.4882, respectively; and in 1954, to $0.975 and $0.444 respectively.

The 1954 reduction was announced on April 12, 1954, by a release saying in part:

> "During its 85 years of existence the Company has made 26 successive reductions in toll rates (with only 2 increases, both in war time, when traffic virtually disappeared).
>
> "The further (27th) reduction which becomes effective July 15 next will bring down the laden rate from 36.5 E.p. [Egyptian piasters] ($1.048) to 34 E.p. ($0.975) and the ballast rate from 17 E.p. ($0.488) to 15.5 E.p. ($0.444) per Suez net ton.
>
> "The new step down of Canal dues reflects the Company's traditional policy of sharing its prosperity with its clients. It is being made at a time when

shipowners are facing mounting costs and continually falling freight rates."*

[The sources of the foregoing statements are the release of April 12, 1954, the Company "fact sheet" of October 1, 1954 and correspondence with the Company.]

The Events that Congress did not Expect and Caused this Litigation.

Throughout this litigation defendant has always claimed that Congress anticipated that the formula would result in a 5¢ increase in the toll rate, e.g. Brief, 17.

Although there is some support for the claim that Congress expected the immediate result to be an increase of 5¢ a ton (R. 166-167), Congress foresaw that increased use of the Canal might require a reduced toll under the formula it was planning to adopt, *infra* pp. 73-74.

What Congress did not foresee was the reversal in the operating results of the business activities and the tactics thereupon adopted by defendant. Instead of earning their administrative expenses and a large profit, as they had for many years, for reasons that are not clear**, after July 1, 1951 the operating results of these activities became steadily worse until they failed to earn even their administrative expenses. *Infra* pp. 65-66. Contrary to law defendant then loaded these losses on the Canal activity, and as the Court of Appeals characterized it, "concealed" what it was doing by "ambiguous bookkeeping" (R. 249).

When the Comptroller General revealed what had happened plaintiffs brought this action to enforce the statutory tolls policy.

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* March, 1958 is also such a time.

** The GAO 1955 audit report suggested inefficient management and various other factors, pp. 34-36; cf. R. 240.

Summary of Argument.

The case presents three basic questions: First, has defendant unlawfully withheld and unreasonably delayed the prescription of reduced tolls? Second, did the District Court have jurisdiction to compel defendant to prescribe tolls by mandatory injunction? Third, are plaintiffs entitled to recover damages suffered by reason of defendant's unlawful and unreasonable failure to reduce tolls?

1. The unlawful withholding and the unreasonable delay. The central substantive issue in the case is whether or not defendant is entitled to charge the losses of the so-called "collateral activities" or "business activities" for tolls-fixing purposes under the formula provided by Section 412, Title 2 of the Canal Zone Code. Plaintiffs maintain that the statute does not permit that there be taken into account the losses of these activities which serve the Armed Forces, the Republic of Panama and the public as well as the Canal.

A study of defendant's books, made by the General Accounting Office in connection with its audit of defendant's affairs for the fiscal year ended June 30, 1954, showed that, disregarding these losses, defendant's toll collections were far in excess of the amount necessary to pay the defendant's costs lawfully considered in tolls-fixing.

For the three years ended June 30, 1954 the GAO showed Canal revenue of $112,861,870 as against all properly chargeable expense, apart from these losses, of $85,021,366, a difference of $27,836,504. In other words, tolls far lower would have produced the revenue required by the statute. Defendant had been collecting $25,000 a day more tolls than authorized by the statute. Defendant's subsequent reports show approximately the same, if not a greater rate of excess.

Hence, if the losses are not to be taken into account it is clear that defendant has long been charging in excess of the statutory rate.

A. *The losses of the collateral activities are not to be taken into account.*

(1) *The language of the statute.* Analysis of Section 412 shows that the losses of the collateral activities were not included in the formula. The phraseology of the Section 412 formula relates to the Canal only, and not to the business activities.

(2) *Legislative history.* As for legislative history, resolutions, testimony, studies and committee reports show a clear understanding by all concerned that the tolls were to service Canal costs only, and that the collateral activities were to bear their share of general expense, i.e., interest, administrative expense and cost of Canal Zone Government.

(3) *Defendant's admissions.* In its budget program for 1952 and elsewhere, and particularly by an opinion of its General Counsel given in 1953, defendant has admitted that the Canal activities and collateral activities were to be separately self-sufficient.

(4) *Defendant's "ambiguous bookkeeping"*: omissions, inconsistencies and irregularities.* In order to conceal its failure to comply with the formula, defendant's bookkeeping has been, in the language of the Court of Appeals, "ambiguous," and has been characterized by omissions, inconsistencies and irregularities. For instance, defendant has in recent years failed to show its results of operation on an activity basis; it has not complied with the

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* Quoting the Court of Appeals (R. 249).

requirement of the Government Corporation Control Act that its budget programs show expected results of operation by activities; it has paid large sums to the U. S. Treasury without lawful warrant; it has engaged in an unauthorized "valuation of assets"; it has written up its capital account by the reversal of entries going back forty years; and it has largely and inexplicably increased its administrative expense.

B. *To charge the losses of the business activities against tolls also violates the provision of the Hay-Pauncefote Treaty requiring that tolls be "just and equitable."* The reason is that the collateral activities serve the Army, the Navy, the Air Force, the Republic of Panama and the public generally. These activities only incidentally service the Canal. In substance, for the Canal to absorb these losses, means that the tollspayers are contributing to the expenses of the Armed Services, the Republic of Panama and those members of the public who use the services of the collateral activities. Congress, correctly applying the Hay-Pauncefote Treaty, has recognized that national defense costs are not a proper charge on tolls.

C. *Toll rate not a matter of defendant's pleasure.* The District Judge decided that defendant could keep a toll rate so long as it was "content" with it. The Court of Appeals disagreed.

Section 411 authorized defendant to prescribe tolls; Section 412 provided that tolls "shall be prescribed" according to the formula of that section; and Section 14 of the Act of 1950 made both Sections 411 and 412 "effective" as of the day the President transferred the Canal to defendant—viz., July 1, 1951.

"Shall" is "language of command." Hence it became defendant's duty to bring tolls in line with the formula on July 1, 1951.

Moreover, and this was emphasized by the Court of Appeals, the legislative history shows that Congress intended to adopt a new policy by which tolls would go up or down according to the operations of the formula—that is, as business increased or decreased, as costs went higher or lower, etc.

2. The District Court had jurisdiction to compel defendant to prescribe tolls by mandatory injunction. In general a district court may compel a corporation or Government agency to comply with a statutory duty. And defendant is as subject to suit as any corporation—not only is this true as a general principle of law but, in this instance, Congress by the Act of July 16, 1949, revised the Federal Tort Claims Act so that defendant would be subject to suit like "any private corporation."

To escape jurisdiction defendant has advanced the theory that the President's power to review defendant's tolls prescriptions has somehow changed the tolls-fixing process from administration of statutory policy by the executive branch into a matter of executive policy. The President has, we are in substance told, absolute discretion ("unlimited" according to the District Judge) in tolls-fixing, and tolls prescriptions by defendant pursuant to statute constitute mere possibly helpful items of information. Plaintiffs wholly disagree.

By Section 411 Congress provided for the administration of the tolls policy defined in Section 412. The function of the President was to "take Care" that defendant "faithfully" carried out that policy. Both the President and defendant in acting under Section 411 are bound by Section 412.

A. *Contrary to defendant's contention, statutes applicable to defendant not only fail to "preclude" judicial scrutiny of its disobedience of the statute, but positively invite it.*

B. *The premise on which defendant urges cases and arguments relating to matters of executive policy is false. The Section 411 proviso put upon the President a duty to enforce the Congressional tolls policy; it did not grant a privilege to disregard it.* This result is reached by all appropriate standards and guides, viz., the language of the statute, especially as that language has been judicially construed, the legislative history, the arrangement of the statute, the Hay-Pauncefote Treaty, the law of rate-making, and the respective constitutional functions of Congress and the President. The fallacy of defendant's argument is sharply indicated by its statement of the non-statutory factors it says the President may consider.

C. *Jurisdiction exists whatever the review power may mean.* Defendant's principal argument is that jurisdiction is lacking by reason of the President's review power provided in Section 411.

But whatever that review power may be, defendant may be compelled to prescribe tolls. The courts can require that corporations and Government agencies perform their statutory duties even if the result is not judicially reviewable or for any reason may never become effective, including statutory duties preliminary to action by the President.

D. *Miscellaneous reasons given by defendant for lack of jurisdiction, such as its alleged special competence to interpret statutes, the alleged necessity for construing the Act of 1950, and the allegedly unexpected result of the Act of 1950, are unfounded.*

E. *The district courts generally may grant mandatory relief.* Defendant argues that the only district court that may grant mandatory relief is the District Court for the District of Columbia. But a host of cases, particularly *Virginian Ry.* v. *System Federation,* 300 U. S. 515, and *Brown* v. *Board of Education,* 349 U. S. 294, establish that the other district courts also have that power.

F. *Plaintiffs have standing to sue.* Defendant also challenges plaintiffs' standing to sue, relying particularly on *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113.

Plaintiffs reject this challenge. In private law those entitled to lawful rates have status to enforce that right by suit. Plaintiffs are so entitled under both the Hay-Pauncefote Treaty and the Act of 1950, whether defendant be considered as a Government corporation subject to suit or as an agency of the United States.

Of the cases cited by defendant, *Perkins* turns on the "unrestricted power" of "private individuals and businesses" to "fix the terms and conditions upon which they will make needed purchases." *Alabama Power* turns on the lack of status of a stranger to a loan to bring suit to enjoin the loan. The distinction between those cases and this is obvious.

Defendants intricate argument that this case does not come within Sec. 10(a) of the Administrative Procedure Act would turn that Section into a prohibition against judicial review in all cases in which such review was not explicitly provided. But the language and history of that Section show that, on the contrary, it was intended to provide for judicial review in all cases other than those in which such review was "precluded."

G. *The Court of Appeals acted properly in directing the entry of summary judgment for plaintiffs.*

H. *Although this question is not now before the Court, if the President should base the exercise of his review power upon an error of law, the courts would have power to correct it under the Administrative Procedure Act and applicable principles of law.* The courts may examine the lawfulness of the actions of the President; the words "final and conclusive" do not bar judicial review; and the President is not a necessary party defendant.

3. Damages. The Court of Appeals held against plaintiffs on the question of damages for the excessive tolls collected in the past for two reasons: because "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant, and because it could "find no evidence of a congressional intent to allow recovery of overcharges" (R. 257). Defendant more or less adopts this reasoning.

A. *If the President was to enforce the law, there is no difficulty in ascertaining damages.* If it be found, as we have already urged, that it is the duty of the President under the Section 411 proviso to enforce the law, that difficulty disappears. The District Court can readily ascertain the difference between the rate required by law and the rate actually collected and give judgment for the difference. Although it is true that the statute contemplates that rates be fixed prospectively whereas a court would fix them retrospectively, that is a difficulty always found in rate cases, yet the authority of courts and commissions to grant reparation is unquestioned.

B. *Congress necessarily intended that damages be paid if duty were breached.* Congress, by creating between plaintiffs and their class, and defendant, legal relationships —the Act of 1950 and the Hay-Pauncefote Treaty—that have historically called for damages when duty is breached

showed its intent that damages be allowed plaintiffs in the present situation.

C. *To refuse damages positively obstructs the intent of Congress that tolls be charged as provided in the Act of 1950 and the Hay-Pauncefote Treaty.*

PART ONE.

Defendant unlawfully withheld and unreasonably delayed the prescription of reduced tolls.

I. Sections 411 and 412 provide that tolls be prescribed on the basis of Canal operations only, and without regard to the losses of defendant's collateral activities.

II. Because the collateral activities serve the Armed Forces, the Republic of Panama and the public generally, as well as the Canal, inclusion of their losses would violate the Hay-Pauncefote Treaty as well as the substantive formula provided by the Act of 1950.

III. The Canal's operating results called for the imposition of reduced tolls.

IV. The duty to prescribe tolls in accordance with the Section 412 formula took effect on the transfer of the Canal to defendant on July 1, 1951 and not at defendant's pleasure.

POINT I.

Sections 411 and 412 provide that tolls be prescribed on the basis of Canal operations only, and without regard to the losses of defendant's collateral activities.

This heading presents the central substantive issue in the case. If plaintiffs are correct on this issue, the GAO analysis, never challenged by defendant, leaves no doubt that for many years tolls "calculated to cover" the costs,

including interest, of Canal operation only would have been far less than 90¢ a laden ton.

We shall show that, first, the language of the statute, second, the legislative history, and, third, defendant's own admissions, including the opinion of its general counsel, establish the proposition asserted in the heading.

The rule of statutory construction in this type of case was declared by this Court, in enforcing in favor of a user against a canal company a statute fixing its tolls, to be that "any ambiguity in the terms of the grant [referring to the statute creating the company and providing for tolls] must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given it by law." *Perrine* v. *Chesapeake & Delaware Canal Co.*, 8 How. 172, 192.

Plaintiffs submit that the statute clearly requires that tolls be fixed on the basis of the Canal activity only. The Court of Appeals so found without the slightest difficulty (R. 248-249):

> "That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the statute, each enterprise was expected to be self-sustaining and the annual commercial-style budget of the defendant corporation was expected to facilitate congressional scrutiny of the various operations . . . The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money."

If, however, defendant's argument—and it seems to us a lame one—should create any doubt in the Court's mind, that doubt should be resolved against defendant.

The language of the Statute. Section 412(b), as amended by the Act of 1950, provides that (Appendix A, 6a-7a):

> "Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government".

The context of the statute and other circumstances demonstrate decisively that the expression "facilities and appurtenances related thereto" does *not* refer to defendant's railroad, shipping line, grocery stores and other collateral activities, but only can mean the locks, tugs, launches and similar facilities related directly to Canal operation.

The expression "Panama Canal, together with facilities and appurtenances related thereto" appears elsewhere in the statute in a context that establishes indisputably that Congress did not include the business activities in that expression.

Section 10 of the Act of 1950, enacting Section 256, Title 2, of the Code authorized the President to transfer to the corporation (Appendix A, 5a):

> (a) ". . . the Panama Canal, together with the facilities and appurtenances related thereto, and"
>
> (b) "any or all of the facilities and appurtenances heretofore maintained and operated by the Panama

Canal under authority of Section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and"

(c) "all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities . . ."

We know then from the identity of expression in Sections 10 and 12 that the properties included in the tolls formula comprised the properties of The Panama Canal, the unincorporated agency, included in (a) above, and not those included in (b) and (c). By reference to Section 51, Title 2, as amended by the Act of August 12, 1949, we know that the properties referred to in (b) are (Defendant's Brief, 157):

". . . docks, wharves, piers, drydocks, shops, yards, marine railways, salvage and towing facilities, dredging facilities, construction facilities, fuel-handling facilities, motor-transportation facilities, civil air terminals, power systems, water and sewer systems, warehouses, storehouses, hotels, a printing plant, living quarters and other buildings, and any other necessary facilities and appurtenances . . ."

As obviously a statute providing for transfer could not refer to properties the transferee already possessed, we also know that the expression "Panama Canal, together with the facilities and appurtenances related thereto" could not refer to the numerous "business activities" already in defendant's possession, received by it from the Panama Railroad Company (the New York company) in 1948.

By process of elimination the only possible conclusion is that the expression "Panama Canal, together with the facilities and appurtenances relating thereto" refers to

what defendant described in its first annual report as follows (R. 171):

> "Canal activities comprise those functions directly related to the waterway and transiting of ships, such as the marine operation, maintenance of the canal channel, operation and maintenance of the locks, meteorology and hydrographic work, and ferry service across the canal at Balboa."

When the President on June 29, 1951 issued his Executive Order No. 10263, he transferred to the defendant (16 F. R. 6333):

> "(a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, *and* (b) all other facilities, buildings, structures and improvements whatsoever now maintained and operated by the Panama Canal [with certain specified exceptions]."

Defendant argues that "facilities and appurtenances" are words of "art", which mean any business facility in the Zone (Brief, 85). Of course the words "facilities and appurtenances" can be applied to almost anything. The question at issue is, however, what is the meaning of the expression "the Panama Canal, together with facilities and appurtenances relating thereto"? Section 10 shows indubitably that that expression, as used in the Act of 1950, did not include the business activities, and President Truman's transfer order shows the same.

Allocation of interest and administrative expense. The statute expressly provides for the allocation of cost of Canal Zone Government. The Court may wonder why no express provision was made for the allocation of the other general expenses.

For many years defendant, its predecessor Panama Railroad Company (the New York company) and The Panama Canal, the unincorporated agency, had allocated administrative expense among activities and shown results on an activity basis, as we demonstrate in our discussion of defendant's "ambiguous bookkeeping", *infra* pp. 60-67. Apparently it was taken for granted that defendant would continue to do so.

The Company pays interest on investment (Section 246, Title 2, Canal Zone Code). Hence interest allocates itself on the basis of the investments in the respective activities—the basis on which the General Accounting Office has allocated interest for the purpose of determining the results of operation according to the statutory formula; cf. *infra* p. 55.

The Legislative History. The legislative history is clear that tolls were to be based on the Canal activity only and that the general expenses were to be allocated among defendant's various activities.

When an increase in tolls was first mooted in March, 1948, the shipping industry protested that non-Canal costs were being charged against tolls.

Speaking at a hearing of the Senate Appropriations Committee held on March 19, 1948, Mr. Frazer Bailey, President of the National Federation of American Shipping, said*:

> "There are many activities in the Canal Zone of civil, municipal and military character. There are railroad activities not connected with Canal transit; hotels, Government stores, sanitation, etcetera. When the costs of these activities increase it is not

* Civil Functions, Department of the Army Appropriation Bill, 1366.

an equitable answer to increase the transit tolls against commercial ships".

In considering the legislative history it is to be borne in mind that the purpose of the Congressional investigation was to obtain information which would lead to a fair allocation of costs as between the Canal operation and other Government activities in the Canal Zone in the light of the shipping industry's protest that tolls bore too heavy a share. Thus House Resolution 44, adopted February 28, 1949, which initiated the legislative process that eventuated in the Act of 1950, provided (95 Cong. Rec. 1617; Appendix I, 40a-41a):

> "*Resolved*, That the Committee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal with particular reference *to the proper accounting and allocation of costs* attributable to—
>
> (a) the transit of the Canal by commercial, governmental, and military vessels of United States and foreign nations;
>
> (b) military activities of the United States in and connected with the Canal Zone;
>
> (c) United States civil government, including, but not limited, to sanitation, public schools, playgrounds, hospitals, and so forth;
>
> (d) business operations conducted under the supervision of the Governor General of the Panama Canal by the various business units of the Panama Canal and Panama Railroad Company;
>
> and to recommend to the Congress concerning *what elements of cost should be properly used in the future as the basis of a policy* to be followed in establishing and

levying tolls for the use of the Panama Canal for transit purposes."

The subcommittee appointed pursuant to this resolution reported that it could not recommend a fair allocation because the accounts were not sufficiently clear. Noting that "it is strange that the fixing of tolls should be a responsibility of the President" (43a), the report urged that the President cause the Bureau of the Budget to make a study of the Canal and recommend appropriate organizational and tolls policy changes (Report No. 1304, 81st Cong. 1st Sess., excerpts from which are printed in Appendix I, 41a-44a).

The Bureau made such a study. The bill that became the Act of 1950 sought to carry out its recommendations, with an exception immaterial here.

That study, speaking of the collateral activities, said in part (R. 99):

> "Sales and services to all others [all other than divisions of the Company itself and of the Canal Zone Government], including Government agencies, should be at prices over cost which may reasonably be expected to cover, in the aggregate, *the interest on the Government's investment and the Company's share of the expense of civil government and related activities.*"

Mr. Harold Seidman of the Bureau of the Budget was the Bureau's spokesman before the Congressional committees. Senator Byrd presided at the Senate Committee hearing, and Mr. Chambers was the Committee staff member assigned to the bill. The following colloquy occurred between them during the Senate hearing (R. 127-128):

> "Mr. Seidman. I can explain some of that difference fairly readily * * *. Then under the present

formula all the costs of civil government, health, and sanitation, are charged against tolls. The Panama Railroad Company does not contribute hardly anything to that. That is charged against tolls. This will be spread over the whole enterprise.

"Again taking very rough estimates, there would be about 50 percent. I think the Chief of the Management Division of the Panama Canal did provide estimates of about 53 percent of the 1949 figures would be against tolls.

"Mr. Chambers. When you redistribute the costs among various businesses like commissaries, et cetera, *the net result will be they will have to be self-sustaining and contribute their share toward the overall operating costs of the Canal.*

"Mr. Seidman. It is the intention of this bill that the whole enterprise shall be self-sustaining and conducted without either direct or indirect cost to the United States Treasury.

"Mr. Chambers. To whatever extent that comes about, that will be reflected in reduced charges against the ships going through the Canal?

"Mr. Seidman. Yes; to the extent that these costs are borne by other than shipping, they will naturally be reflected in the tolls.

"Senator Byrd. Interest on investment—

"Mr. Seidman. It includes interest on the investment. *In estimating the interest, of course, each of these business operations, any business has to carry its share of the interest, too, in proportion to the investment.*"

Another colloquy between Mr. Seidman and Mr. Chambers was as follows (R. 129):

"Mr. Chambers. Coming back to these commissaries and other business that you operate down there, in figuring out the amount they have to pay,

> *the interest they have to pay,* are you leaving in the interest on capital investment at the time of construction?
>
> "Mr. Seidman. No."

The railroad industry has naturally and historically been interested in keeping tolls high. Its representative at the hearing, Mr. Gregory Prince, noted with satisfaction that the traditional profits of the business activities would not benefit tolls, saying (R. 140):

> "In view of the requirement in paragraph (b) of section 412 of title 2 of the Canal Zone Code as it would be amended by this bill, that tolls be prescribed at a rate calculated to cover all costs of maintaining and operating the Canal, *it seems clear that revenues from the railroad and other business activities of the new company are not to be used to subsidize the operation of the Canal itself.*"

In short, Mr. Prince assumed—and he was not contradicted—that the toll rate was to be calculated without regard to the operating results of the business activities.

As noted below, *infra* pp. 65-66, what had been for many years the large profits of the business activities have now turned to losses, but the principle of the statute is equally applicable.

The report of the House Merchant Marine Committee, recommending the bill, said in part (Appendix C, 15a-16a):

> "Your committee is informed that the resulting allocation is expected currently to assess approximately an equal division of the expense of health, sanitation, and civil government between the transit division and other corporate divisions. . . .
>
> "It is generally agreed that in calculating the toll rate there should be excluded from the capital base all investment in equipment and structures, of

> business operations which are not directly related to operation of the Canal, all health, sanitation, and civil government facilities and equipment."

The Senate Armed Services Committee reported in part (R. 165-166):

> "In addition to paying for the cost of operating and maintaining the Canal, it is estimated that about 50 per cent of the cost of civil government would be supported by the tolls collected from transit vessels. The remainder of the cost of civil government would be borne by the other business activities such as hotels, commissaries, etc."

The Senate Report contained a kind of pro forma work sheet, showing how the formula would work in actual practice. This work sheet gives figures for the Canal only, as distinguished from defendant generally. That is to say, the calculation was made on a Canal activity basis and not a Company-wide basis.

Thus "Revenue" was taken by this work sheet to comprise "Commercial tolls", "Government transits (now exempt)" and "Other outside revenue" (R. 167). This "Other outside revenue" was estimated at $2,300,000 (R. 167), which was approximately the amount of revenue derived from the pilotage and tug services related to Canal operation in the first year of defendant's operation of the Canal (the exact figure was $2,347,861 [R. 25]); it has run slightly higher since, R. 27, 29. Expenses exclusive of interest and cost of Canal Zone Government were estimated at $18,500,000 (R. 167), also approximately what Canal operating expense proved to be in 1952 and 1953 (R. 25, 27; figures on the same basis are not available for subsequent years). Aggregate revenue was estimated at $28,800,000 and aggregate expense at $30,200,000 (R. 167). Obviously

these estimates were *not* Company-wide. The Company's revenue in its first year was $100,050,488 and its expenses, including cost of Canal Zone Government and interest—which were included in the pro forma work sheet—were $97,681,458 (R. 25, 26).

Defendant's own admissions, including the opinion of its general counsel, have recognized that the Act of 1950 required that the collateral activities were to bear their share of general expense.

The 1952 budget program. Defendant's budget program for 1952 squarely recognized that tolls were to be based on the Canal activity, that the financial results of its different activities were to be separately self-sufficient and that the general expenses were to be allocated among them to accomplish that result.

Annexed in Appendix F hereto are excerpts from defendant's budget programs for 1951, 1952 and 1958. These programs are published in the President's Budget, made public every January and applicable to the fiscal year ending the second June 30 following. The budget program for 1952 was therefore prepared in the latter part of 1950, at the time of the consideration and enactment of the Act of September 26, 1950.

The analysis accompanying the 1952 budget program states that defendant's operations consist of a variety of activities which for budget purposes are tentatively grouped in three main categories: (1) Canal activities, (2) commercial activities, and (3) quarters (Appendix F, 27a).

For each group of activities the budget program shows general expenses allocated as follows (Appendix F, 30a-32a):

	Canal	Commercial	Quarters
Interest	$7,467,000	$ 620,000	$249,000
Cost of Canal Zone Government	$4,158,000	$2,384,000	$312,000
General and Administrative	$ 839,000	$1,160,000	$ 51,000

The 1952 budget program was accompanied by an explanation, substantial excerpts from which are printed in Appendix F, 26a-29a. This explanation describes the defendant's various activities, including the Canal activities. With respect to Canal activities, the explanation comments that at the anticipated level of traffic there will be a deficit, but "a rate increase is projected, to be effective for the latter half of the fiscal year, allowing time for the Corporation to give due notice" (Appendix F, 29a). This rate increase will, the explanation contemplates, reduce the deficit.

The explanation also contemplates a deficit for the other activities, noting that the deficit is to "*be entirely attributed to classifying interest and the proportionate cost of Canal Zone Government as expenses of commercial activities*" (Appendix F, 29a). But the explanation in no respect implies that the higher toll rate be used to make up the deficit for the other activities. On the contrary, the explanation anticipates an "increase in income . . . will probably have to be obtained through higher rates or charges for services rendered, *particularly for some of the commercial activities and quarters*" (Appendix F, 28a).

The explanation takes for granted that it will be necessary to make allocations as between the various activities (Appendix F, 27a). The reference to allocations can only refer to general expenses, for direct expenses allocate themselves.

Thus at the time of the enactment of the Act of 1950 defendant believed that the various activities were to be separately self-sufficient, that the prices to the commercial activities would have to be increased to pay general expenses, and that it was in order to increase tolls, albeit solely to make the tolls activity self-sustaining.

The opinion of General Counsel. In an opinion submitted to the Governor* in December, 1953 defendant's General Counsel advised that the prices charged by the activities must suffice to pay their share of general expenses. Our information on this subject is derived from the following paragraph in the GAO audit report for 1954 (R. 58):

> "The Company's practice of establishing relatively low prices for commodities and services has resulted in fringe benefits to Canal organization employees and contributed to the losses sustained by business activities. Generally, sales of commodities and services to employees have been considered a transaction within the Canal organization, and, as such, the prices charged have not included all elements of Canal Zone Government costs and other general corporate expenses. In December 1953 the Governor and the comptroller prepared a pricing policy statement for submission to the board of directors. *Basically the policy conformed to the Company's practice for the past 2 years. However, the statement was not officially presented to the board because the Company's general counsel stated that in his opinion the policy was not in accord with the intent and purposes of the basic legislation.* We concur in the opinion of the general counsel that, insofar as transactions with the Company are concerned, employees have the same status as other customers. As of December 10, 1954, no further action had been taken by the management or board of directors to formalize the existing pricing policy."

Plaintiffs sought to get a copy of this report by deposition, interrogatories and requests to admit, any privilege that may have originally applied to this opinion having been waived. *Himmelfarb* v. *United States*, 175 F. 2d 924,

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* Who is also defendant's President, Section 247, Title 2, Canal Zone Code.

938-939 (C. A. 9th). On defendant's motion the District Judge stayed these discovery proceedings by his orders of December 22, 1955 and January 4, 1956 (R. 209-210; 212-213).

In the context, and in the light of defendant's extreme reluctance to reveal this opinion, the only possible conclusion is that defendant's General Counsel advised that defendant had no right to pay all defendant's general expenses from tolls, but that the other activities must pay their share.

Defendant's General Counsel is Hon. Paul A. Bentz, a career lawyer in the Canal Zone civil service and codifier of the Canal Zone Code. What right defendant's then President (Brig. Gen. J. S. Seybold) had to disregard this opinion and to withhold it from the Board of Directors is difficult to conceive.

Throughout this litigation plaintiffs have clamored for the production of this opinion and more or less taunted defendant for its secretiveness about it, *e.g.* R. 202-203; plaintiff's petition for certiorari in No. 252, pp. 12-13. But defendant has been apparently so afraid of the effect of this opinion that it has preferred to endure the taunts. Although defendant made the opinion available to the General Accounting Office, it denies even this Court that assistance.

Defendant recognizes its obligation in its 1954 report. The duty to allocate was also recognized by defendant in its 1954 report. That report (R. 175) referred to bills pending in Congress to amend Section 412(b) "so as to redistribute the corporate burden internally in order to shift a relatively larger portion of the burden on the tolls activity, and, correspondingly, to decrease the portion of overall obligations which is to be borne by other activities of the Com-

pany''—a remark which showed that defendant was aware how Section 412 then did, as it now does, distribute the "overall obligations," because, as noted, it is by charging its general expense against tolls that defendant has used tolls to absorb the losses of its other ventures.

POINT II.

Because the collateral activities serve the Armed Forces, the Republic of Panama and the public generally, as well as the Canal, inclusion of their losses would violate the Hay-Pauncefote Treaty as well as the substantive formula provided by the Act of 1950.

To absorb the losses of the collateral activities violates not only the policy laid down by the Act of 1950, but also the Hay-Pauncefote Treaty, incorporated in Section 412(d) by that Act, requiring that t s be "just and equitable."

The reason is that the business activities are not exclusively engaged in serving the Canal, but serve all U. S. Governmental activities in the Canal Zone, referring primarily to the Armed Forces, and also the Republic of Panama and the public generally. Accordingly not only would it not be reasonable under our municipal rate-making law to include the business activities in the tolls base, but such inclusion would also violate the policy of Congress, in accordance with the Hay-Pauncefote Treaty, that costs of national defense should not be charged against tolls. Thus Congress sought through the years that it was "hammering out" the Act of 1950 (R. 249) to avoid burdening tolls with national defense cost ; in fact, as House Resolution 44 shows, that was the primary purpose of the Act.

Before developing this point we shall, however, describe the episode of 1912-1913 when the British and United States

Governments seemingly agreed that "just and equitable" tolls meant tolls sufficient to pay Canal costs only.

Foreign Minister Grey asserts without objection from Secretary Knox that tolls should cover Canal operating costs and interest only. The meaning of the "just and equitable" tolls provisions has apparently been discussed only once between the British and the American Governments. At the time of the controversy over the exemption for United States coastwise traffic provided by the Act of August 24, 1912, Sir Edward Grey, the British Foreign Minister, maintained that the exemption violated not only the anti-discrimination provision but also the "just and equitable" tolls provision of the Treaty. In a memorandum written by Sir Edward Grey on November 14, 1912, and handed to United States Secretary of State Philander C. Knox by British Ambassador James Bryce on December 9, 1912, the Foreign Minister asserted (*Foreign Relations of the United States—1912,* p. 486):

> "This rule also provides that the tolls should b 'just and equitable'. The purpose of these words was to limit the tolls to the amount representing the fair value of the services rendered, i.e., *to the interest on the capital expended and the cost of operation and maintenance of the Canal.* Unless the whole volume of shipping which passes through the Canal, and which benefits all equally by its services, is taken into account, there are no means of determining whether the tolls chargeable upon a vessel represent that vessel's fair proportion of the current expenditure properly chargeable against the Canal, that is to say, interest on the capital expended in construction, and the cost of operation and maintenance."

Secretary Knox submitted a memorandum dated January 17, 1913 to the United States Charge d'Affaires in

London, for transmission to the British Government. He made no objection to Sir Edward Grey's interpretation of the Treaty*, but argued that it was not relevant because the toll rate then tentatively fixed, on the basis of estimates, did reflect United States coastwise traffic (*Foreign Relations of the United States—1913*, p. 545).

Thus both Governments were apparently in agreement that under the Treaty the toll should be based on the results of operation of the Canal—not the Canal together with various other activities.

It is quite true that the particular aspect in which the question was then presented involved not the taking into account of the losses of non-Canal activities, but the alleged failure to take into account what were, at least in the opinion of the British and a large section of the American public, all of the legitimate earnings of the Canal. However, these two aspects are opposite sides of the same coin.

THE BUSINESS ACTIVITIES SERVE THE ARMED FORCES, THE REPUBLIC OF PANAMA AND THE PUBLIC GENERALLY AS WELL AS THE CANAL; AND THEIR LOSSES ARE TO AN APPRECIABLE EXTENT DUE TO NATIONAL DEFENSE POLICY.

The collateral activities do not service the Canal exclusively; on the contrary, they also service the Army, the Navy, the Air Force, the Republic of Panama and the public generally. In a letter written on May 9, 1945 to the Chairman of House Committee on Expenditures in the Executive Departments in connection with the bill that became the Government Corporation Control Act, the Secretary of War (Mr. Stimson) asserted (H. Rep. No. 856, 79th Cong. 1st Sess. 61-62):

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* That is, in this respect. Secretary Knox did disagree with Sir Edward Grey's interpretation of the anti-discrimination clause.

"The Panama Railroad Company is essentially a service agency for the Panama Canal, the Army, the Navy and the Republic of Panama, and it is required to adapt its operations without delay to the changing needs of the organizations and interests which it serves. For example, the decision was made some months ago to base in the Canal Zone a large fleet of vessels engaged in traffic of vital importance to the war in the Pacific, and the Panama Railroad Company was required on extremely short notice to assume responsibility for furnishing food, clothing, and other necessities to those vessels, a task equivalent in magnitude to supplying an additional population of over 15,000 persons and involving considerable increases in both administrative and non-administrative expenses . . ."

"The nature and magnitude of the Company's operations depend almost entirely upon the general level of activity of the various Government agencies in the Canal Zone and of private and governmental business in the Republic of Panama. . . . The demands upon the Company by the Republic of Panama will depend upon general world conditions and upon Canal Zone activities, which are reflected in Panama . . .

". . . In addition to furnishing railroad and other service to various Government departments and establishments in the Canal Zone at rates much below those provided for in the Company's commercial tariffs, the Company's steamship line carried Government cargo and passengers during the 20 years prior to 1942 (when the steamers were requisitioned for use for direct war purposes) at rates which represent reductions from tariff of more than $10,000,000 . . ."

Of special interest is Secretary Stimson's last sentence quoted above, in which he pointed out that the Government

got concessions from tariff of over $10,000,000. Obviously under such circumstances inclusion of the shipping line's losses would constitute a subsidy from the tolls-payers to the Government to that extent.

We quote in Appendix E, 20a-22a, defendant's analysis of its activities in its budget program for 1951. Each activity is there described. These descriptions show that most of the activities serve other Government agencies, the Republic of Panama and the public generally. None serve the Canal exclusively.

Thus the railroad "serves The Panama Canal, the United States Army, Navy, and Air Force, and other Government agencies on the Isthmus, and also performs the functions of a common carrier in meeting the needs of the Republic of Panama" (20a); the harbor facilities serve the ports of "Cristobal and Balboa, either for ultimate destination in the Canal Zone or the Republic of Panama, or for transshipment to points beyond" (21a); the telephone system provides service for "The Panama Canal and for the civilian communities in the Canal Zone [and] to the Departments of the Army and Navy and to the Government of Panama" (21a), etc.

In *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, this Court, discussing the activities of the Panama Railroad Company (the New York company), noted that it served the Armed Forces and the public, and that its ships "carry freight for the government of the United States to the Canal Zone at 25% less than customary tariff rates" (p. 403). Although characterizing the Company as an "auxiliary" of the Canal, the context shows that the reference was to the complex of Governmental activity in the Zone; the Court held that the Company's personnel was exempt from state income tax because the Company was

primarily engaged in "governmental operations" (pp. 407-408).

The presence of the military greatly increases defendant's non-Canal costs. In his 1954 audit report, the Comptroller General had this to say (R. 41):

> "Canal organization officials have no control over military activities, but the Canal organization activities are greatly affected by the presence of the Armed Services. Armed Services personnel and their dependents comprise about half of the total population, and a significant part of the land area is under military control."

In fact 95 square miles of the Zone are under the control of the Armed Services, as compared with only 13.6 square miles under defendant's control (Appendix I, 48a). The Armed Services are increasing their activities. By Article VIII of the Treaty with Panama concluded January 25, 1955 the Republic granted to the United States an additional area of 7,857 hectares for maneuvers and military training. TIAS, 3297.

In his 1953 report the Comptroller General said (p. 43):

> "The defense establishment exerts a significant influence on the scope and efficiency of many of the Canal organization's activities. About one-half of the total population of the Zone consists of military and civilian personnel of the Armed Services and their dependents, and a large part of the developed land area is restricted to military purposes. The responsibility for the construction and maintenance of public roads, schools, hospitals, utilities, and other community services falls upon the Canal organization. The military agencies' operations and personnel have greatly increased the volume of these services. Much of the heavy vehicular traffic is attributable to the military. Consequently, more

substantial highways and roads and more frequent and more costly maintenance are necessary. The greater volume of traffic necessitates more extensive police and court facilities. More and larger schools and more teachers are required to accommodate the greater juvenile population. Of all these increased costs, prior to the 1954 fiscal year, only the proportionate costs of the school system were subject to reimbursement by the military and other agencies; the remainder were borne by the Company."

The losses of the business activities are substantially due to national defense policy. Another and independent reason why it would be inequitable to charge the losses of the "business activities" against tolls is that the losses are to a large extent attributable to a national defense policy, viz., the employment of a large proportion of United States citizens in jobs that could be filled locally.

The cost of such a large proportion of United States citizens, not justifiable on any ground other than national defense, was stated by GAO in its 1954 audit report as follows (R. 56-58):

"The losses in the business activities are attributable in a large degree to the high cost incurred in employing United States citizens in positions that could be filled locally. United States citizens constitute a large community in the Canal Zone and are used in all except the very lowest grades of labor. To obtain United States citizens for work in the tropics, the Company incurs abnormal expenses in the form of premium wages,* additional leave, free vacation travel, recruitment, and repatriation. Also, the Company bears most of the net cost of furnishing services generally provided by state and municipal

* United States nationals are paid according to their ratings (GS numbers) under the Classified Civil Service Act, 5 U. S. C. §1081, and also receive the benefits referred to by GAO.

governments by including only a part of these costs in prices to the customers of the business activities.

"A report entitled 'Study of Overseas Personnel any Pay Practices of Sixteen Private Firms' jointly prepared in November 1952 by the Bureau of the Budget, Civil Service Commission, Department of State, and Department of Defense states that (1) the number of United States citizens employed by the firms under study ranged from one-half of 1 percent to 5 percent of the total number of overseas employees and (2) native workers are employed in almost every category of position including responsible technical and executive posts.

"The Virgin Islands Corporation, a wholly owned Government corporation in the Caribbean area, employs less than 10 continental United States citizens out of a total of about 1,200 employees who, although United States citizens, are natives of the Virgin Islands or Puerto Rico and receive compensation comparable to that paid by businesses in that area.

"From 1921 to date, except for the World War II period, about 25 percent of Canal organization employees have been United States citizens. U. S. rate employees in the Canal Zone hold positions in all categories except journeymen's helpers, day laborers, porters, custodians, stevedores, sales clerks, messengers, etc. This compares unfavorably with the practice of commercial companies operating overseas. The wisdom of operating supporting facilities for a disproportionate number of United States citizens is seriously questioned.

"We believe that the proportion of United States citizens could be substantially reduced at the present time by employing Panamanians in many semiskilled and clerical jobs. Under a proper program of apprenticeship and training, Panamanians could fill positions requiring greater skills and responsibilities. The transition would not mean a

wholesale firing of present employees but could be accomplished largely by attrition. There is an urgent need for long-range planning, full-time direction, and continuity of management to cope with these problems."

TO INCLUDE THESE ACTIVITIES SERVING OTHERS, PRIMARILY THE ARMED FORCES, WOULD VIOLATE DOMESTIC RATE-MAKING PRINCIPLES, THE POLICY OF CONGRESS THAT TOLLS NOT BE REQUIRED TO BEAR NATIONAL DEFENSE COSTS, AND THE HAY-PAUNCEFOTE TREATY.

This Court has often had occasion to consider rates and rate-making. Its view has always been that a business whose rates were subject to regulation was entitled to earn a return on only property "used and useful" in the service rendered, and that property merely connected with the service was not to be taken into account. *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38; *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 70; *Western Distributing Co.* v. *Commission*, 285 U. S. 119, 124, 126; *San Diego L. & T. Co.* v. *Jasper*, 189 U. S. 439, 446; cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

Obviously, the collateral activities are not used in the Canal service directly. Plaintiffs concede that if the collateral activities *exclusively* served the Canal, and were essential for that purpose, cf. pp. 65-69, a case could be made for their inclusion in the rate-making base. As the opposite is true, our municipal law requires their exclusion.

Congress has recognized that a distinction should be drawn between the costs of national defense and of Canal operation. Thus in Section 246(b), Title 2, Canal Zone Code, in providing for the amount at which property shall be transferred to defendant, Congress has specified that

"there shall be excluded from such amount any portion of the value of the transferred property which is properly allocable to national defense." Again in Section 246(d), Congress provided that there be excluded from defendant's surplus "losses incurred through directives based on national policy and not related to the operations of the corporation." As we have already noted, the primary purpose of the Act of 1950 was to insure that tolls were not burdened with national defense costs.

The Hay-Pauncefote Treaty provides that tolls be "just and equitable." Our law of rates shows that inclusion of collateral activities such as defendant's in the rate base is not just and equitable. In its recognition that national defense costs are not properly charged to tolls, Congress correctly applied the Hay-Pauncefote Treaty.

POINT III.

The Canal's operating results called for the prescription of reduced tolls.

The GAO 1954 audit report, released May 16, 1955, reviewed defendant's operations from July 1, 1951 to June 30, 1954 as follows (R. 42-43):

> "The legislative hearings and reports of congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government. . . .
>
> "The Company has had 3 years' operating experience under the Federal charter (2 Canal Zone Code 245 to 258, inclusive), as amended by the act of September 26, 1950 (64 Stat. 1038). The Com-

pany, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government, and administrative and other general expenses) to the activity operating results reported by the Company. . . .

"The analysis of the Company's reported net income of $13,000,000 for the 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. The term 'business activities' as used in this report includes all commercial and service activities, except the canal activity. . .

"* * * Thus the net income from the canal activity is being used to offset losses from business activities.

". . . We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412(b). Based on the financial results of the canal activity for the past 3 years, *toll rates would have to be reduced substantially if hearings were held at this time.* (See recommendation to Cong., p. 8.)"

The analysis prepared by GAO and set forth in its 1954 report is shown on the opposite page (R. 53):

	"Three years ended June 30, 1954"		
	Canal activity	Business activities	Total
"Revenue	$112,861,870	$141,958,379	$254,820,249
"Operating expenses, including adjustments in 1954 to prior years' retained income	44,436,726	129,556,812	173,993,538
"Operating income	68,425,144	12,401,567	80,826,711
"General corporate expense (allocated by General Accounting Office):			
Net cost of Canal Zone Government (note a)	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	2,916,069	9,630,222	12,546,291
	40,588,640	27,209,538	67,798,178
"Net income (—loss)	$ 27,836,504*	—$ 14,807,971	$ 13,028,533

"(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. • • •

"(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.05, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. • • • About 78 percent of this (gross investment in fixed properties) is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

"(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity."

* The amount of $25,000 a day as the overcharge is reached by dividing $27,836,504 by 1,096, the number of days involved. The amount of $4,000 a day as the original plaintiffs' share of the excess is based upon the ratio of tolls paid by plaintiffs to aggregate tolls (R. 10, 53).

This table presents the operating results at the time suit was brought in September 1955. Since then defendant has published annual reports for fiscal years ended June 30, 1955, 1956 and 1957. The reports for 1955 and 1956 show that the toll rate continues to be excessive. The 1957 report does not contain data affording a basis for the computation (cf. footnote 4, *supra* p. 18). The following table shows for 1955 and 1956 for the Canal activity (a) operating income, i.e., gross income less direct operating expense, (b) the Canal's share of general expense using the allocation factors used by GAO, and (c) excess income.

	Operating Income	General Expense	Excess
1955[1]	$22,140,000	$14,818,000	$ 7,322,000
1956[2]	$24,718,718	$14,712,445	$10,006,273
1956[2]	$24,719,000	$15,879,000	$ 8,840,000
1957		not available	

[1] GAO audit report for 1955, p. 20.

[2] The upper 1956 line computes the excess according to the allocation factors continuously used by GAO for the years 1951-1955. However, for 1956, GAO, at the urging of defendant, abandoned the direction-of-effort method of allocation which it had previously used and which defendant had used in 1952 and 1953 when it published allocated figures. The result was to diminish the excess income of the Canal activity to the extent of about $1,136,000 (cf. 1956 audit report, 17, 18).

According to defendant's report for 1955 in that fiscal year it paid a dividend of $10,000,000 and applied $3,943,482 to the acquisition of fixed plant, that is, to the acquisition of new capital assets (Report, 46). The dividends purportedly were paid under Section 253, Title 2, of the Canal Zone Code.*

* Payment of these dividends was a violation of the tolls formula which makes no provision for dividends. Section 253 was enacted by the Act of 1948 which provided for the federal incorporation of the Panama Railroad Company (the New York company)

According to defendant's report for 1956, in that fiscal year it paid a dividend of $5,000,000 and applied $4,787,865 to the acquisition of fixed plant (Report, 40).

As its other activities were operating at a loss—after allocation of general expense—this means that tolls, in addition to paying all general expenses, provided the funds for these large additional expenditures.

At the request of counsel, plaintiffs' accountants prepared a cumulative statement of the source and disposition of defendant's funds July 1, 1951—June 30, 1957 as shown by defendant's annual reports. Appendix J, 50a. This statement shows that from earnings since July 1, 1951 defendant has done the following:

1. Paid dividends of $15,000,000;

2. Applied $38,000,000 to the acquisition of fixed plant;

3. Increased cash by $8,553,000;

4. Increased the excess of notes and accounts receivable over current liabilities by $602,000.

In addition, defendant has used tolls to absorb $27,836,504 losses of the business activities for the period July 1, 1951—June 30, 1954 alone and probably an even greater additional amount since that time.

It is readily apparent that if the Section 412 formula were enforced, tolls would be "reduced substantially", as the Comptroller General noted in his 1954 audit report, *supra* p. 55.

(Appendix A, 4a). That Company, as already noted *supra* p. 15, had been highly profitable for many years and paid large sums in dividends. Because it was expected that its activities would continue to be profitable, Section 253 was not repealed at the time of the enactment of the Act of 1950.

The Comptroller General's report provides forceful and unanswered evidence that, on the basis of results of operation of the Canal activity, defendant should long ago have prescribed reduced tolls.

Defendant has sought to make out in its petition for a stay and its petition for certiorari, and to some, albeit lesser, extent in its present brief, that this is a controversy between accountants in which the courts have no right to meddle; that the Court of Appeals has wrongly inflicted, in the name of the Government Corporation Control Act, the Comptroller General's accounting theories on defendant.

This theory is unfounded.* Plaintiffs never argued and the Court of Appeals did not hold that, because of the GAO report, tolls should be prescribed on the basis of Canal operations; both the Court of Appeals and the plaintiffs have relied on Section 412 for their view that the statute did not permit absorption of the losses of the business activities.

The significance of the GAO report is evidentiary. Because of defendant's concealment effected by "ambiguous bookkeeping," as the Court of Appeals described it (R. 249), plaintiffs were not able to prove, until the publication of the GAO report, what the results of the Canal activity were. The Comptroller General, because he had no

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* The straw from which defendant has tried to create this issue is prayer No. 4 of the complaint (R. 8) and of the motion for summary judgment (R. 11), that in prescribing tolls defendant be compelled to use "accounts [not] less favorable to plaintiffs and their class than those determined by the General Accounting Office." But, as the preceding prayers and the complaint make clear, prayer No. 4 was intended to apply only *after* the courts had determined, as a matter of law, that defendant must prescribe tolls as required by the statute, that is, on the basis of the Canal operation. Because it was thought to be premature plaintiff never argued the theory of prayer No. 4 to the Court of Appeals. And there is not a word in the opinion of the Court of Appeals to suggest that it thought the GAO's statutory construction binding on defendant.

doubt that the statute required that tolls be prescribed on the basis of the Canal activity, showed the enormous profits of the Canal as contrasted with the losses of the business activities.

The forceful character of the Comptroller General's analysis is confirmed by defendant's failure to answer it. There lurk here and there in defendant's brief intimations that it disagrees with the Comptroller General* but nowhere does defendant affirmatively show its own analysis. Defendant's expressions of disagreement (e. g., Brief, 78) apparently relate to statutory interpretation, not to matters of accounting. Defendant has wholly defaulted respecting evidence as to the financial results of the Canal activity.

This policy of silence and concealment runs far back. The Comptroller General did not make his allocations because he disagreed with defendant's, but because defendant had none to offer, or refused to make them available. Thus the GAO 1954 report said (R. 42):

> "However the Company did not have available for our examination an analysis to determine the financial results by activities."

The 1955 report stated at p. 18:

> "During our 1955 audit report we again requested the Company to furnish an analysis of financial results by activity. Although we were

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* For instance defendant suggests (Brief, 78) that the losses of the business activities are part of the "costs of maintaining and operating the Panama Canal." But defendant's own financial reports show no such artificial concept of maintenance and operation costs (R. 25-30; cf. Appendix F, 30a; Appendix G, 33a-34a); on the contrary they treat such costs as applicable to the Canal activity only. Detailed tables not printed in the Record show even more clearly what defendant has regarded as the costs of maintaining and operating the Panama Canal, e. g., 1952 report, p. 42; 1953 report, p. 51; 1954 report, p. 49.

informed that an analysis had been prepared, it was not made available for our use."

Defendant's attitude was one of silence and concealment to others and the public generally as well as to the GAO auditors, as we shall proceed to show.

Defendant "concealed" the situation by "ambiguous bookkeeping".

The Court of Appeals said that defendant "concealed" what it was doing by "ambiguous bookkeeping" (R. 249). Unambiguous bookkeeping would have brought about much earlier a demand for reduced tolls and would have simplified the proof of the plaintiffs' right to the reduced tolls. It would have subjected to Congressional scrutiny the losses of the business activities. We list below illustrations of defendant's "ambiguous bookkeeping".

Failure to show results of operation on an activity basis. Prior to fiscal 1952, defendant's annual reports and those of its predecessor, Panama Railroad Company (the New York company), broke down general expenses, other than a relatively small sum for pensions, between its various divisions, and showed net income on a divisional basis. Appendix D, 18a. It has never done so since it acquired the Canal.

Failure to comply with requirement of Government Corporation Control Act that budget programs show estimated results of operation on an activity basis. The Government Corporation Control Act, 31 U. S. C. §847, requires Government corporations to submit annually budget programs showing "estimates of operation by major types of activities."

Obviously to do so requires allocation of general expense. Prior to its acquisition of the Canal defendant complied

with this requirement; its budget program for 1951, annexed as Appendix E, 23a-25a, shows administrative expense allocated to each activity.

Defendant's 1952 budget program, annexed as Appendix F, 26a-32a, prepared in the fall of 1950 and submitted in January, 1951, when everyone's mind was familiar with the legislative history, also allocated general expenses to each activity including the Canal activity, and therefore complied with 31 U. S. C. §847.

As time went on defendant's budget programs contained less and less allocation, and no subsequent budget program showed estimated results of operation for the Canal activity. Beginning with 1956, the budget programs made no allocation whatever. 1953 Budget, pp. 725-727; 1954 Budget, pp. 684-685; 1955 Budget, pp. 631-637; 1956 Budget, pp. 647-649. We annex schedules of defendant's 1958 budget program, Appendix G, 33a-34a, showing the failure to estimate the results of the Canal activity and to allocate general expense. By this device the budget programs indicate that the business activities are operating on a break-even basis. As GAO said in its 1953 report (p. 50), "From the standpoint of sound accounting and financial reporting, there is no justification for this action."

Meanwhile other multi-activity Government corporations continue to comply with 31 U. S. C. §847. We annex as Appendix H, 35a-39a, the 1958 budget programs of the Tennessee Valley Authority and the Virgin Islands Corporation. These budget programs show estimated results of operation on an activity basis in compliance with law. General expense—that is, administrative expense and interest—is allocated to each activity.

Write-ups of capital account: (a) *Reversal of channel entries.* In fiscal 1954 defendant reversed its treatment of Canal channel costs to the extent of $34,097,996 (R. 177).

This sum had been charged to "operations", or "expensed", as the expression is, over many years, apparently since the Canal was opened to traffic in 1914. By arbitrary action defendant capitalized these items. The effect was to add interest costs of slightly over $1,000,000 a year (R. 177).

Thus tolls, which paid these costs as operating expenses 1914-1954, are now required to pay them over again as interest.

(b) *Reduction in accumulated depreciation.* Also in fiscal 1954 defendant arbitrarily extended the service life of many items of equipment, thereby reducing accumulated depreciation by $11,283,917 (R. 177). In other words, having used tolls to pay depreciation costs, defendant, by this bookkeeping adjustment, will require tolls to pay that depreciation over again.

Payment of large sums of interest to the U. S. Treasury without warrant in law; the unauthorized and unlawful "valuation of assets." "Oh, what a tangled web we weave. . . ."*

The Act of 1948, enacting Section 246(c), Title 2, of the Canal Zone Code, directed defendant to pay interest to the U. S. Treasury "on the net direct investment of the Government in the corporation, as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein . . ." (Appendix A, 3a).

According to note 8 to the financial statements in the GAO 1954 audit report (R. 72), the amount of the receipt had never been changed from the original figure of $1. Accordingly defendant had no authority to pay interest to the U. S. Treasury beyond a few cents on the $1. Defendant has, however, paid large sums in interest, $23,957,853 as of June 30, 1954 (R. 32), plus $9,043,766 in 1955 (Report, 53),

* Scott, *Marmion*, Canto VI, Stanza 17.

$8,590,710 in 1956 (Report, 47) and $8,867,932 in 1957 (Report, 20).

The real offense, however, is not so much in the payment of the interest. Congress undoubtedly intended that defendant pay interest on its investment in the Canal, as distinguished from the nominal figure of $1. Plaintiffs have no objection to its doing so.* Defendant became involved in these unauthorized interest payments because of its violation of Section 246(b), Title 2, of the Canal Zone Code. That paragraph requires that all "transfers of property to" defendant by another Government agency "*shall be at such appropriate amount or amounts as shall be agreed upon* between the corporation and the agencies concerned and approved by the Director of the Bureau of the Budget," the amount to be stated in a cumulative receipt.

When the Canal was transferred to defendant on July 1, 1951 this statutory command was not observed. Hence the receipt was not increased.

Instead defendant embarked on a so-called "valuation of assets" which went on until September, 1957 (Defendant's Brief; 145, 180-181): The principal accomplishments of this valuation were the write-up of the channel account and the write-down in depreciation referred to *supra* pp. 61-62.

At the time of the transfer of the Canal to defendant nothing was said about any valuation of assets. "The Panama Canal," the unincorporated agency, kept complete

* At the hearings which preceded the Act of 1950 officers of shipping industry trade associations urged that the Canal's national defense value be recognized by not requiring defendant to pay interest. Appendix I, 48a; cf. R. 122. Congress recognized that argument only to the extent that it excluded from the capital base interest paid during construction. Section 412(e). Undoubtedly Sections 246(c) and 412(e) control in this litigation.

books. The actual transfer was deferred by the President nine months after the passage of the Act of 1950 so that the necessary paper work preliminary to the transfer could be done (Appendix F, 26a). No reason appears why Section 246(b) could not have been complied with. The United States Government appears to have undertaken at Panama the kind of write-up it has, with the approval of this Court, condemned when done by others who had a duty to charge reasonable rates, *United States* v. *New York Telephone Co.*, 326 U. S. 638.*

To add insult to injury, defendant argued that this valuation of assets excused its failure to prescribe tolls as commanded by Section 412(b) (R. 193, 249). The argument has not been repeated in this Court, perhaps because the valuation was completed in September, 1957.

The large and unexplained increase in administrative expense. One of the most mystifying features of defendant's "ambiguous bookkeeping" is its treatment of administrative expense. For years before July 1, 1951 the general and administrative expenses in the Canal Zone had been allocated between The Panama Canal and the Panama Railroad Company (the New York company) and defendant without visible difficulty.

For fiscal 1952 defendant's report allocated to Canal operation $697,757 of aggregate "General and administrative expenses" amounting to $2,772,634 (R. 25).

For fiscal 1953 the corresponding figures were $660,932 and $2,745,327, respectively (R. 27).

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* An examination of uniform systems of accounts prescribed by federal regulatory agencies indicates that such write-ups are invariably forbidden. Federal Communications Commission (telephone companies) Regs. 31.100; 31.2-21; Interstate Commerce Commission (railroad companies) Regs. 10.733; (inland and coastal water carriers) Regs. 324.1-151; (motor carriers) Regs. 182.01-20.

In fiscal 1954 defendant wrote up its capital account by reversal of the channel entries and reduction in accumulated depreciation. That year it also radically revised its treatment of general and administrative expense. *The item leapt from $2,745,327 to $4,957,714 and no allocation whatever was shown* (R. 30).

Taking this treatment of general and administrative expense together with the capital account write-ups and the disregard and withholding of General Counsel's opinion, *supra* p. 40, all of which occurred in fiscal 1954, the conclusion is forced that during that year defendant made a conscious decision to avoid compliance with the formula defined by Congress and to manipulate its books to that end.

Apparently one device in that effort was to reclassify as general various expenses of the business activities which had previously been treated as direct. This conclusion is supported by an examination of Table 7, "Administrative and Other General Expense" in defendant's 1956 report, p. 50. This table is replete with items such as "Unrecovered costs of railroad operations," "Unrecovered costs of steamship line," etc., that have no relation to the administration of the Canal, and appear to be direct expenses of the business activities.

The unexplained reversal in the operating results of the business activities. One deplorable feature of defendant's "ambiguous bookkeeping" is that it hides the reversal in the operating results of the business activities—the remarkable change from profit to loss.

Prior to 1951 the business activities not only paid their administrative expenses fully, but also paid dividends of $23,994,905 to the U. S. Treasury (R. 69).* For fiscal 1951,

* However, defendant, citing R. 110, states the amount of the dividends to have been $38,000,000 (Brief, 11). In any event they were large.

the last year before the transfer, defendant's budget program explicitly shows its expectation that it will earn its administrative expense and make a profit (Appendix E, 23a-25a), and subsequently it reported that it had done so.

The statement is also true of the business activities of The Panama Canal. In his 1949 report the Governor said (p. 28):

> "Business operations of The Panama Canal are conducted separately from operating activities pertaining directly to the transiting of vessels and the government and sanitation of the Canal Zone . . . It is the aim to operate the business activities as a whole on a self-supporting basis and, in general, to include as a charge against their operations 3 per cent interest on the net investment . . . The net revenue of $1,006,959.04 fell short by $125,962.76 of meeting this capital charge."

[The report for 1949 was the last available at the time the bill that became the Act of 1950 was under consideration. Also, on January 31, 1950, pursuant to the Act of August 12, 1949, many of The Panama Canal's business activities were transferred to defendant (R. 19-20).]

What the cause may be for this sudden switch from profit to loss can not be understood from defendant's reports. It is clear, however, that some radical change has affected the business activities, that this change has been concealed by its bookkeeping and that the resultant losses have been loaded on tolls.

Defendant, by its "ambiguous bookkeeping" and by charging its business activities losses to tolls, has frustrated the intent of the Government Corporation Control Act that controversial activities be closely scrutinized by Congress. As already noted, defendant's budget programs, *supra* p. 60, fail to comply with 31 U. S. C. §847, requir-

ing Government corporations to submit "estimates of operation by major types of activities."

Some of defendant's activities and methods of operation are highly controversial. The General Accounting Office has been sharply critical of its activities. Its 1953 report condemned the shipping line in many respects (pp. 50-52). Its 1955 report charged defendant with inefficient management, as noted by the Court of Appeals (R. 240; Report, 34-36); cf. also *supra* p. 21. The Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense of the Commission on Organization of the Executive Branch of the Government (i.e., the "Hoover" Commission) made special studies reaching highly adverse conclusions respecting both the railroad and the shipping line (Report, 319-336; 337-362). The Commission had this to say (Report on Transportation, 80):

> "Despite the semblance of civilian leadership provided by the corporate structure, the Company is completely dominated by the military personnel. The *duplication of functions and wasteful management* arise from this inner conflict."

It is our purpose here not to analyze the usefulness and efficiency of defendant's business activities, but to show the validity of the Court of Appeals finding that defendant's practices are causing the very evils "the Government Corporation Control Act and the 1950 amendments to the Panama Canal Act were designed to prevent" (R. 249).

POINT IV.

The duty to prescribe tolls in accordance with the Section 412 formula took effect upon the transfer of the Canal to defendant on July 1, 1951 and not at defendant's pleasure.

The District Judge summed up his views on the subject as follows (R. 217):

> "It is my conclusion that the statute did not compel prescription of tolls under the statutory formula as long as defendant was *content* with the then prevailing tolls".

Not argued by defendant. The theory that the timing of tolls prescription was a matter of defendant's *pleasure* was introduced by the District Judge on his own initiative. As is evident from Mr. Colby's affidavit (R. 186), defendant maintained in the District Court that it was a matter of defendant's *discretion,* and that its discretion had not been abused. In the Court of Appeals defendant adopted the District Judge's "discussion" of the problem, but its principal argument on this phase of the case continued to be that it had not abused its discretion.

Hence the references in Section I "Meaning of the 1950 Statute" of the Court of Appeals opinion to the "defendant views", "defendant next points to", "defendant draws us to", etc. are somewhat misleading (R. 240-245). It was the District Judge who conceived these arguments; the defendant itself, except in the sense that it expressed approval of the "discussion" by the District Judge, has never made them.

1. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO ADOPT A NEW TOLLS POLICY, NOT TO PROVIDE DEFENDANT WITH AN ALTERNATIVE POLICY TO PUT INTO EFFECT AT ITS PLEASURE.

The legislative history of the Act of 1950 has already been reviewed under Point I to show that Congress intended that tolls be based on Canal operations only, and without regard to the business activities. Here we shall review that history to show that Congress intended to establish policy as stated in the heading above. Unfortunately a certain amount of repetition is unavoidable.

It will be recalled that after the President had announced an increased rate the House of Representatives adopted House Resolution 44 authorizing a study "with particular reference to the proper accounting and allocation of costs attributable to" Canal transits, military activities, civil government and defendant's business operations, *supra* p. 35. The preamble of this resolution recited that (Appendix I, 40a):

> "Whereas, it is the responsibility of the Congress of the United States to establish the policy to be followed in prescribing the tolls that shall be levied for the use of the Panama Canal . . ."

A subcommittee of that Committee recommended that the President cause a study to be made of the organizational aspects of the Canal and meanwhile postpone the increase in the toll rate (Report No. 1304, 81st Cong. 1st Sess.).

The subcommittee's report, an excerpt from which is printed as Appendix I, b, 41a-44a, shows that it considered tolls policy as its subject. The reason that the subcommittee gave for its request for an organizational study was that, "The appropriate toll policy can hardly be decided upon

and administered without business type accounts, similar to those of public utilities, upon which to rely for the basic financial and operating data." Appendix I, 43a. The accounts of The Panama Canal, an unincorporated agency, did not provide such data, the subcommittee noted at p. 44a.

The ensuing study by the Bureau of the Budget contained a section entitled "Tolls Policy" (R. 91-94).

Inter alia the study stated (R. 102):

> "Provided that there is agreement as to the formula [i.e., policy] for establishing the tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors."

Thus the Bureau saw defendant's rate-fixing as the exercise of "almost a ministerial function," and not as a matter of consent.

Following the budget study, H. R. 8677 was introduced to carry out its recommendations. In so far as Sections 411 and 412 are concerned the bill employed the precise language eventually adopted by the Act of September 26, 1950, except that a sentence limiting tolls to $1 per ton was struck from the bill by the Senate Armed Services Committee.

H. R. 8677 was the subject of substantially similar hearings and reports both by the Senate Armed Services Committee and the House Merchant Marine Committee. The hearing and report by the Senate Armed Services Committee comprise Exhibit D and are quoted almost *in extenso* in the Record (R. 104-169).

The Armed Services report asserted that the purpose of the bill was to improve the organization of the Panama Canal and to establish an equitable and proper base for

the "collection of tolls". The report continued: "Tolls will be calculated in accordance with a formula written into the law .... *The toll rate will, of course, be affected by any future changes in operating costs, interest rates, and Canal traffic and may be revised up or down*" (R. 167).

The House Merchant Marine report said in part (Appendix C, 15a-17a):

> "The recommendations contemplate . . . (c) that tolls for commercial ships *should be related to transit costs*, including interest on Government investment in the Canal and a fair share of the net cost of health, sanitation, and civil government .... Your committee believes that *legislation* reorganizing the Panama Canal and *establishing tolls policy* has long been needed".

At the committee hearings all who participated understood the bill to require defendant to prescribe tolls in accordance with the formula therein provided as soon as the transfer to defendant was accomplished.

Thus, Mr. Seidman of the Bureau of the Budget said the bill provided that defendant "*shall prescribe* the toll rates in accordance with a *formula.*" Armed Services Hearing (R. 108). Mr. Seidman also spoke of the bill as "*requiring* that—'tolls shall be prescribed at a rate * * *' " (R. 110). Mr. Shackelford, Counselor of the Army, referred to the bill as "*requiring* tolls to be—'prescribed at a rate * * *' " (R. 114). Mr. Ball, representing the Association of American Ship Owners, said that the bill "would *require* that tolls be fixed at a rate calculated to cover * * *" (R. 117). Mr. Burdick, of the Office of the Panama Canal, said that "the tolls rate * * * *will be set* high enough to pay about half" of the cost of the Canal Zone Government. "The other half *will be paid* by these business divisions" (R. 134). Mr. Prince, representing the Association

of American Railroads, spoke of "the *requirement* * * * that tolls be prescribed at a rate calculated to cover * * *" (R. 140). Mr. Bailey, representing the National Federation of Shipping, said that, "Under the bill * * * tolls for commercial ships would be related to transit costs * * *" (R. 146).

Mr. Seidman and other witnesses also explained that the "business activities" would bear their share of overhead charges. Thus, Mr. Seidman said that "* * * each of these business operations, any business has to carry its share of the interest, too, in proportion to the investment" (R. 128). Mr. Burdick, of the office of the Panama Canal, said that tolls would pay "about half" of the cost of "civil government." "The other half will be paid by these business divisions" (R. 134). These views were repeated in the Armed Services Report (R. 166).

Thus Congress understood and intended that the defendant's other activities would bear their proper share of general expenses, a purpose frustrated if, as has happened, defendant can, by keeping the 90¢ rate, pay those expenses from tolls.

Also inconsistent with the theory that defendant could keep the 90¢ rate at its pleasure is the elimination by the Armed Services Committee of the provision for $1 per ton maximum, an elimination approved by the Senate and acquiesced in by the House. In explanation of the deletion, the Armed Services report said (R. 165):

> "The House wrote in an amendment which would have placed a limit of $1 per net vessel-ton on the rate of tolls which could be charged. Such a limitation is entirely inconsistent with the principles of this legislation, *since the bill establishes a method of calculating tolls* at such a level as will make the

> Panama Canal self-supporting. The institution of an arbitrary ceiling could quite readily result in the Canal being forced to operate at a loss."

In other words, the bill embodied a tolls policy expressed by a formula. And if it was "entirely inconsistent" that there be a ceiling, it would be equally inconsistent that there be a floor imposed at defendant's pleasure.

Also inconsistent with the "content" theory, the legislative history shows that Congress anticipated that its formula rate might result in lower tolls. The legislative history shows that Congress anticipated that under the statute tolls would be governed by the operation of the formula, and, if the formula spelled lower tolls, then the rate would go down.

Thus the Armed Services Report said (R. 167):

> "The toll rate will, of course, be affected by any future changes in operating costs, interest rates, and *Canal traffic* and *may be revised either up or down.*"

The Bureau of the Budget study recommended with respect to tolls that ". . . *the rate should be adjusted periodically as changes take place in the factors* that determine the charges that should be made for the use of the Canal" (R. 102).

And the study quoted as follows from the 1937 special committee (R. 102):

> "Economic and commercial conditions are not static . . . The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse."

Moreover the study criticized the existing statute on the ground that it did "not lend itself to the ready adjustment of rates, *either up or down*, to reflect increases or decreases in costs or changes in commercial conditions" (R. 102).

Summarizing: The legislative history demonstrates conclusively that Congress understood that the bill provided a new tolls policy which would take effect if the bill were adopted; that the policy related tolls to costs and that tolls would be periodically adjusted to reflect changes in costs and revenues.

There is not a word in the legislative history to suggest that a rate higher than the formula rate could be kept by defendant at its pleasure.

2. (a) AS A MATTER OF LANGUAGE, AND ESPECIALLY AS COMPARED WITH THEIR PREVIOUS WORDING, SECTIONS 411 AND 412 AS AMENDED BY THE ACT OF SEPTEMBER 26, 1950 SHOW THAT SECTION 411 WAS INTENDED TO DESIGNATE THE TOLLS-FIXING AUTHORITY AND SECTION 412 TO REQUIRE THAT TOLLS BE FIXED ACCORDING TO THE FORMULA THEREIN PROVIDED, EFFECTIVE, ACCORDING TO SECTION 14 OF THE ACT, ON THE DAY OF TRANSFER.

This proposition is demonstrated the more clearly by an examination of Sections 411 and 412 in comparative print form, in which matter omitted from existing law is indicated by brackets, and new matter by italics. A comparative print was annexed to the Armed Services report (R. 167-169).

We have also, in order to show the mandatory nature of Section 412, underlined the word "shall" wherever it appears therein.

The comparative print form, with the underlineations to which we have referred, follows:

"CHAPTER 23 — TOLLS FOR USE OF CANAL

"411. AUTHORITY [OF PRESIDENT] TO PRESCRIBE [AND CHANGE] MEASUREMENT—RULES AND TOLLS.—

The [President] *Panama Canal Company* is authorized [subject to the provisions of the section next following] to prescribe and from time to time change (1) *the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.]: *Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

"412. BASES OF TOLLS [; MAXIMUM AND MINIMUM RATES].—(a) Tolls on merchant vessels, army and navy transports, colliers, *tankers,* hospital ships, supply ships and yachts *shall** be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by

* Underlineation by plaintiffs.

the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft *shall** be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) *Tolls shall** *be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall** *be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.*

"(c) *Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay*

* Underlineation by plaintiffs.

tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall* be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall* be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.*

"(d) The levy of tolls is subject to the provisions of *section I of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901,* of *article* XVIII *and* XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes *shall** not include any interest during construction."

Also relevant are:

Section 14 of the Act of September 26, 1950 providing that, with an exception immaterial here, the Act *"shall take effect upon the effective date of the transfer to the corporation * * * of the Panama Canal * * *"*. This date proved to be July 1, 1951 (Executive Order No. 10263, published at 16 F. R. 6333).

Article III, Section I of the Hay-Pauncefote Treaty, incorporated by reference in subsection (d), and providing that tolls shall be "just and equitable", has been quoted *supra* pp. 10-11.

* Underlineation by plaintiffs.

When Sections 411 and 412 as enacted in 1950 are compared with their prior form, any doubt as to their purpose disappears.

Previously Section 411 had designated the President as the tolls-fixing authority and defined the tolls-fixing procedure. Section 412 had provided the basis on which he should prescribe tolls, *i.e.*, between 75¢ and $1 per laden ton.

By the Act of September 26, 1950 Section 411 was amended so as to designate defendant as the tolls-fixing authority and to define the tolls-fixing procedure. Section 412 was amended so as to provide the new basis for tolls.

Now Section 412 made several provisions concerning tolls. In each subsection, except subsection (d), and in every new subsection, Congress used the word "shall" a word held by this Court to be "mandatory", "the language of command", *United States* v. *Thoman,* 156 U. S. 353, 360; *Escoe* v. *Zerbst,* 295 U. S. 490, 493; *Anderson* v. *Yungkau,* 329 U. S. 482, 485.

Thus by subsection (a) tolls "*shall* be based on net vessel-tons" etc.

By subsection (b) tolls "*shall* be prescribed at a rate" etc.

By subsection (c) toll credits for government ships "*shall* be treated as revenues of the Panama Canal Company", etc.

By subsection (e) capital interest purposes "*shall* not include any interest during construction".

Thus the Act of September 26, 1950, like its predecessors, used Section 411 to identify the tolls-fixing authority and define its procedure, and Section 412 to say how that authority should be exercised. The relationship between the two sections was made explicit by the provision that the authority was "subject to the provisions of Section 412".

Now, as already noted, Section 14 of the Act provided that it should become effective when the Canal was transferred to defendant, an event that occurred on July 1, 1951.

Can anyone doubt that Congress intended that all these mandatory provisions of Section 412 should become effective on that day?

And defendant has treated subsections (a), (c) and (e) as effective. In particular its bookkeeping has at all times treated as effective subsection (c), providing for tolls on Government ships, and subsection (e), providing that capital investment for interest purposes should not include interest during construction. The whole purpose of these subsections was for use in tolls prescription under subsection (b). They make no sense except for tolls prescribing purposes under subsection (b).

Defendant has sought, unsuccessfully, to persuade Congress to repeal subsection (e). But if the subsections of Section 412 took effect only at defendant's pleasure, why seek repeal? Why not simply ignore subsection (e)? And if these other subsections of Section 412 become effective on July 1, 1951, how does it happen that subsection (b) did not also then become effective?

And if subsection (b) did become effective on July 1, 1951 there can be no doubt that defendant then and there became subject to a duty to prescribe tolls, for subsection (b) uses the unquestionably mandatory word "shall".

(b) The District Judge Erred, Plaintiffs Submit, In His View That The Statute Did Not Require, But Merely Authorized, The Prescription of Tolls According To The Formula.

Plaintiffs rely primarly on Section 412. The District Judge misconceived plaintiffs' argument; he apparently thought that plaintiffs based their claim of duty under

Section 411, a somewhat baffling misapprehension as plaintiffs were most explicit in their reliance on Section 412(b) as the primary expression of defendant's *duty* to act (R. 13-14).

The District Judge misread the legislative history, plaintiffs submit. The District Judge relied for his theory that the statute provides merely for permission to defendant to use the formula, as distinguished from a duty to use it, upon four statements given before the Congressional committees and quoted in his footnotes 18a and 20a (R. 222-223).

In these statements witnesses refer to the unquestioned fact that Section 411 grants the tolls-fixing authority to defendant. But such grant is in no sense inconsistent with a duty to exercise the authority thus granted. Indeed it has often been held that the mere grant of authority, in matters of private right, required its exercise.* But in this case there was added the affirmative imposition of a duty—Section 412 (b).

One of these statements cited by the District Judge also suggests that if defendant failed to act, Congress, acting through its Appropriation Committees, would force it to do so. But in this aspect the statement indicates that the witness construed the statute as imposing a duty—otherwise there would be no occasion for Congressional compulsion.

Moreover, the District Judge's conclusion was, plaintiffs believe, inconsistent with his own assertion that Congress "hoped that the statute would establish a permanent tolls policy" and the citations supporting that assertion in his footnote 9 (R. 216-217).

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* *Supervisors* v. *United States*, 4 Wall. 435, 445-447; *U. S. Sugar Equalization Board* v. *P. De Ronde & Co.*, 7 F. 2d 981, 985-986.

The District Judge was also in error, plaintiffs submit, in saying that the Act of September 26, 1950 was "precipitated by the belief that an increase in tolls was necessary". As we have already shown, the original factor was the demand of the Governor of The Panama Canal for an increased toll, but the actual precipitation of the Act was the belief that there should be a proper allocation of costs between the various governmental activities in the Zone as evidenced by House Resolution 44 (Appendix I, 40a-41a). The President could have increased tolls without new legislation.

The transposition of the clause "subject to the provisions of the section next following" confirms that the tolls authority of Section 411 is subject to the mandates of Section 412. The District Judge made some point of the fact that the clause "subject to the provisions of the section next following" is put after "change" in the amended Section 411, whereas previously that clause appeared after the word "authorized" (R. 218-219). But, as an examination of the Act of September 26, 1950 in comparative print form will readily show, the reason for the transposition was that the draftsman wished to include authority over rules of measurement in Section 411 rather than in Section 412 in which it was then found.

Indeed, the transposition strengthens our point that the grant of tolls authority in 411 was subject to the mandatory "shall" of 412. For the grant of authority over measurement rules is not subject to 412; in other words, as to the rules, defendant had discretion, but as to tolls, it was required to carry out the policy embodied in the following section.

The transposition also shows that 411 was intended to identify authority and not to enact policy. The Act of 1937 had been somewhat inconsistent in this respect; the Presi-

dent's authority over tolls was provided by 411, but that over rules of measurement by 412. The Act of 1950 identified authority over both matters in 411.

The President was not permitted to exercise his tolls-fixing authority at his pleasure. The District Judge found support for his conclusion that defendant was under no duty to prescribe a new toll so long as it was "content" with the existing rate in the fact that the language of Section 411 as amended by the Act of September 26, 1950 "is identical with the language formerly authorizing the fixing of tolls by the President, whose power was indisputably discretionary" (R. 218).

If we understand the District Judge correctly we can only say that we profoundly disagree. Although exercise of the President's toll-fixing authority undoubtedly involved an element of discretion, as does defendant's, he was definitely under a duty to prescribe tolls within the statutory framework.

The original source of Sections 411 and 412 was Section 5 of the Panama Canal Act of 1912 (37 Stat. 560, 562-3). As amended by the Act of June 15, 1914, two months before the opening of the Canal, that Section read as follows:

> "That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal. . . . When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton. . . ."

Can anyone doubt that by this statute the President was directed to prescribe tolls in accordance with the policy provisions? Was it thought that, in the context, the word "authorized" was used in a permissive sense so that, by

not exercising his authority, the Canal could be made toll-free?

And, continuing the pattern right through the Act of September 26, 1950 we find the phrase "is authorized", first applying to the President and eventually to defendant as a designation of authority followed by policy provisions expressed by the word "shall" directing the exercise of that authority. The successive statutes prior to the Act of 1950 are collected in Appendix B, 10a-13a.

Certainly the Presidents have not conceived their authority as independent of the statutory policy provisions.

President Wilson regarded the tolls-exemption of U. S. coastwise shipping provided by the original Panama Canal Act as a violation of the Hay-Pauncefote Treaty. Together with Senator Elihu Root, he successfully led an agitation for its repeal.* Act of June 15, 1914; 38 Stat. 385. It was in the course of this controversy that Senator Root made the statement quoted *supra* p. 13, describing the status of the United States in the Canal Zone as that of the "mandatory for civilization."

As pointed out by the Court of Appeals at footnote 13 (R. 243), confusion over the statutory definition of tonnage led President Franklin D. Roosevelt in 1937 to appoint a committee to study the subject. The report of this committee recommended a revision of Section 412 to provide that tonnage should be determined in accordance with measurement rules. Senate Document No. 23, 75th Cong. 1st Sess. Congress adopted the recommendation by the Act of August 24, 1937, 50 Stat 750, amending Section 412

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* According to Baker: "It is not too much to say that Wilson's hard won victory not only placed the United States upon a new plane of honorable distinction among the nations, and increased international confidence and good feeling, but that it elevated world standards of diplomatic fair dealing" 4 Baker, *Woodrow Wilson*, 421-422.

accordingly and further providing that tolls should not exceed $1 per ton. President Roosevelt promulgated rules and revised tolls in accordance with the statute the day following its enactment, August 25, 1937. Federal Register, Year 1937, Volume 2, Part 2, pp. 1764-74, 1796.

Thus there are at least two occasions on which the President regarded the power granted by the "authorized" clause as controlled by the following policy language.

PART TWO.

Defendant having unlawfully withheld and unreasonably delayed the prescription of reduced tolls, the District Court may require it to prescribe tolls by mandatory injunction.

The discussion under this Part will assume that, as shown in Part One, defendant has improperly failed to respond to its duty under Section 412 to prescribe tolls in accordance with the formula there defined. This Part will establish that the District Court, under such circumstances, has the power and duty to require such prescription.

A central issue on this phase of the case is defendant's theory that the President's review power under Section 411 makes tolls a matter of executive policy rather than of executive administration of legislative policy. Defendant has predicated many arguments on this theory, which plaintiffs completely reject. We deal with this issue under Point IV. But under Point V we maintain that whatever may be the nature of the President's review power the courts may compel defendant to perform its statutory duty to prescribe tolls. In its anxiety to avoid compliance with the statute, defendant has brought forward many other arguments against jurisdiction some of which, in plaintiffs'

opinion, are rather desperate. We discuss its contentions under point headings as follows:

I. The District Court had jurisdiction over plaintiffs' claim under Title 28, Section 1331, United States Code.

II. Plaintiffs' claim may be enforced against defendant in its capacity as a corporation subject to suit, particularly in light of the legislative history of the Act of July 16, 1949, and, in its capacity as an agency of the United States, under both case law and the Administrative Procedure Act.

III. Statutes applicable to defendant, including statutes which confer functions upon the President and Congress respecting defendant's affairs, in no way "preclude" the assertion of plaintiffs' claim.

IV. The Section 411 proviso for the approval of the President means only that the President should himself "take Care" that defendant "faithfully executed" Section 412 in prescribing tolls. The proviso neither effected an "unlimited delegation" of tolls-making power, nor authorized the President to consider non-statutory factors, nor constituted defendant a mere adviser. The legislative history, the statutory background, the language and arrangement of the statute, the law of rate-making, the character of the non-statutory factors, anomalous and violative of the Hay-Pauncefote Treaty, which the defendant proposes that the President consider, and the Constitution unite to require this construction. The premise upon which defendant argues that it may not be compelled to act or to pay damages is therefore false. Nor was the approval requirement provided to protect the shipping industry.

V. Whatever may be the power of the President and whatever plaintiffs' rights of judicial review of tolls determinations, when made, defendant may be compelled to prescribe tolls. Corporations and agencies may be compelled to act, although their action, when taken, is not subject to judicial review, or for any reason may never become effective. Administrative procedures of which the final outcome is Presidential action not subject to judicial review are not exempt.

VI. Defendant's various distinctions and excuses, that the statute is not "peradventure clear," that rate-making is discretionary, that defendant has been thinking about the

toll rate, that to apply the statute would cause a deficit which Congress did not expect, etc., are invalid because of faulty reasoning and false premises.

VII. Plaintiffs had standing to sue. By Article III, Section I of the Hay-Pauncefote Treaty, incorporated in municipal law by the Act of 1950, plaintiffs' ships were guaranteed freedom of navigation through the Panama Canal at reasonable rates. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, do not apply.

VIII. District courts other than the District Court for the District of Columbia have power to grant mandatory injunctions.

IX. It was orderly procedure for the Court of Appeals to direct the entry of summary judgment.

X. If and to the extent that the order of the President should embody an error of law, it is subject to judicial review. The Canal Zone Code, taken together with the Administrative Procedure Act, differs from the Tariff Act and the Civil Aeronautics Act. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51.

POINT I.

The District Court had jurisdiction over plaintiffs' claim under Title 28, Section 1331, United States Code.

This Section reads:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States".

The complaint was framed to invoke the jurisdiction of the Court under this statute and employs the phraseology suggested by Form (2)b of the Appendix to the Rules of Civil Procedure for such complaints.

It would seem self-evident that this action comes under 28 U. S. C. §1331.

The complaint states a claim under the laws of the United States. This Court has always construed the statute broadly. Its most recent extended discussion of the statute is in *Bell* v. *Hood,* 327 U. S. 678. The Court there held that it was the duty of the District Court to

> "look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon and * * * does determine whether he will bring a "suit arising under" the * * * [Constitution or laws] of the United States by his declaration or bill.' The Fair *v.* Kohler Die Co., 228 U. S. 22, 25" (from p. 681).

The Court continued, at p. 682:

> "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided *after and not before* the court has assumed jurisdiction over the controversy".

Much more could be written on this subject, but we refrain from doing so because the opinion in *Bell* v. *Hood* is so complete.

Defendant is a Government owned corporation incorporated under the laws of the United States. A second and sufficient reason for jurisdiction is the fact that defendant is incorporated under the laws of the United States and is a "wholly owned Government corporation" by specific declaration in the Government Corporation Control Act (31 U. S. C. §846).

Since the historic decision in *Osborn* v. *United States Bank*, 9 Wheat. 738, 816:

> "A suit by or against a corporation created under an Act of Congress is one arising under the laws of the United States".

The quotation is from *Federal Bank* v. *Mitchell*, 277 U. S. 213-4. The opinion in *Federal Bank* v. *Mitchell* discusses this subject fully and authoritatively and enables us to cut short this presentation.

By the Act of February 13, 1925, now 28 U. S. C. §1349, Congress provided that:

> "The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock".

As defendant is wholly owned by the United States, §1349 does not serve to withdraw jurisdiction and confirms the jurisdiction held to exist by *Osborn* v. *United States Bank*.

THE COURT'S JURISDICTION WAS NOT LESSENED BY DEFENDANT'S STATUS AS AN AGENCY OF THE UNITED STATES.

In a brief largely devoted to the thesis that the District Court lacked jurisdiction, defendant does not, so far as plaintiffs can discover, cite a single case in which it was held that a district court lacked jurisdiction over a Government corporation sued on a claim arising under the laws of the United States.

Defendant's constant citation of cases involving unincorporated agencies and the Administrative Procedure Act seems to assume that because defendant is an agency its

suability is thereby lessened. But of course all Government corporations are agencies. In any event the precise argument was overruled in the World War I Emergency Fleet Corporation cases.

The Fleet Corporation was organized under the Act of September 7, 1916, 39 Stat. 728, to own and operate ships. Subsequently the Act of June 15, 1917, 40 Stat. 182, gave the President wide powers respecting ships and provided that, "The President may exercise the power and authority hereby vested in him . . . through such agency or agencies as he shall determine." The President designated the Fleet Corporation.

In *The Lake Monroe*, 250 U. S. 246, and *Sloan Shipyards v. U. S. Fleet Corporation*, 258 U. S. 549, this Court overruled the contention that its status as agent of the President conferred upon it any immunity whatsoever.

More recently in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, this Court, holding an agency not subject to suit on the facts of that case, twice distinguished *Sloan Shipyards* on the ground that it was a suit against a corporation. 337 U. S. 686, 702.

POINT II.

Plaintiffs' claim may be enforced against defendant in its capacity as a corporation subject to suit, particularly in light of the legislative history of the Act of July 16, 1949, and, in its capacity as an agency of the United States, under both case law and the Administrative Procedure Act.

(1) Defendant considered as a public corporation subject to suit.

(a) Defendant is subject to suit "in the same manner as any private corporation".

The Act of June 29, 1948, which created defendant, provided by Section 2, enacting Section 248, Title 2, Canal Zone Code, that defendant:

"(d) May sue and be sued in its corporate name".

That public corporations subject to suit have all the liabilities of private corporations, except as to execution, has been settled by numerous decisions of this Court. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

The 81st Congress, which enacted the Act of September 26, 1950, was well aware of defendant's liability to suit. That Congress, by Public Law 172, 1st Sess., took defendant out of the Federal Tort Claims Act at its own request. Defendant's President, in a letter to the Secretary of the Army, asserted that "since it is engaged in business as a common carrier and in other commercial enterprises the basic policies underlying governmental immunity from suit do not apply". (1949 U. S. Code Cong. Serv. 1593.)

Defendant's President in the same letter further noted that prior to the enactment of the Federal Tort Claims Act the corporation had been fully subject to suit.* Ibid. 1952.

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* Indeed defendant and its predecessor were most active litigants. Under "Table of Cases," Federal and Abbott's New York Digests list 28 lawsuits in which reported opinions were written and in which the Panama Railroad Company (the New York company) or defendant, during the three years that it bore the name Panama Railroad Company, was the plaintiff, appellant or petitioner. 68 Fed. Dig. 13; 68 Fed. Dig. Supp. 7; 40 (Part 2) Abb. N. Y. Dig. 257. Under "Defendant-Plaintiff Table," Federal and Abbott's New York Digests list 50 such lawsuits in which the Company or present defendant was the defendant, appellee or respondent—a total of 78 reported opinions. 70 Fed. Dig. 256; 70 Fed. Dig. Supp. 79; 41A Abb. N. Y. Dig. 317-318. This Court has written opinions in lawsuits of defendant or its predecessor at 166 U. S. 280, 249 U. S. 41, 252 U. S. 308, 264 U. S. 375, 266 U. S. 209, 271 U. S. 557, and 342 U. S. 29—a total of eight times.

The letter also fortified its request by pointing out that a series of statutes treated defendant as a private rather than a governmental operator, viz., the Suits in Admiralty Act, 46 U. S. C. §741, the Jones Act, 46 U. S. C. §688, the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. §§901-950, and the Federal Employers' Liability Act, 45 U. S. C. §52. Ibid. 1590.

The Secretary of the Army transmitted the letter, with his approval, to the House Judiciary Committee (1949 U. S. Code Cong. Serv. 1593).

The House Judiciary Committee agreed. In reporting the bill, the Committee asserted that prior to the Federal Tort Claims Act, defendant was subject to suit "*in the same manner as any private corporation*". The Committee recommended that its former status be restored. House Report No. 830, U. S. Code Cong. Serv. 1590. Congress thereupon did so by Public Law 172, the Act of July 16, 1949, 63 Stat. 444, 28 U. S. C. §2680 (m), excepting defendant from the Federal Tort Claims Act.

A repercussion of Public Law 172 was before this Court in *Gardner* v. *Panama R. Co.*, 342 U. S. 29. This Court's opinion cites House Report No. 830 twice at 342 U. S. 32.

(b) A court of equity will compel a private person or corporation to perform a statutory duty.

We shall here argue the proposition stated above only very briefly. As we understand defendant's argument, it concedes that proposition as a general principle but maintains that because of the review power of the President, an alleged lack of standing to sue, the alleged special qualifications of defendant to interpret statutes and the fact that the suit is not in the District of Columbia, that proposition is not applicable in this case.

Illustrative of the judicial power to compel the performance of statutory duties is *Steele* v. *L. & N. R. Co.*, 323 U. S. 192. In that case the Court considered a suit by several Negroes against a collective bargaining agent to forbid discrimination against them in the agent's negotiations with the employer. The agent had been chosen and functioned under the Railway Labor Act. The Court construed the Act to require the agent to act without discrimination. The Court then addressed itself to the contention that the Act made no provision for judicial relief, and said at p. 207:

> "That right (that the agent act without discrimination) would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. * * * We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of *injunction* and award of damages when appropriate for breach of that duty".

In the subsequent arguments to which we have referred we cite *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, in which a railroad corporation was compelled to "treat with" a labor union, as required by statute; *Union Pacific Ry. Co.* v. *Hall*, 91 U. S. 343; in which a railroad corporation was compelled to operate its railroad as required by statute; *Brown* v. *Board of Education*, 349 U. S. 294, in which a municipal board was compelled to operate its schools according to law; and many others in which courts of equity have by injunctive relief, mandatory or prohibitory, compelled the performance of legal duty; cf. discussion of

power of district courts generally to issue mandatory injunctions, *infra* pp. 160-169, and cases there cited.

(2) *Defendant considered as an agency of the United States.*

Defendant was created by the Act of June 29, 1948, 62 Stat. 1075. Section 2 of that Act, enacting Section 245, Title 2, Canal Zone Code, declares defendant to be an "agency and instrumentality of the United States".

The Administrative Procedure Act defined and expanded the right of judicial review to compel agency action, a right which had existed under case law since earliest times. *Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *United States*, 12 Pet. 524; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, and many other cases.

By Section 10(a) of the Administrative Procedure Act (5 U. S. C. §§1000-1011) "any person suffering legal wrong because of agency action or adversely affected or aggrieved within the meaning of any relevant statute" is "entitled to judicial review". By Section 2(g) "agency action" is defined to include "failure to act".

By Section 10(b) "the form of proceeding" may be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction . . .) in any court of competent jurisdiction".

By Section 10(e) the court "shall (A) compel agency action unlawfully withheld or unreasonably delayed".

We do not understand that defendant denies that ordinarily a court may compel an agency to take action unlawfully withheld or unreasonably delayed, but claims that in this particular instance the general rule does not apply because of the approval power of the President, alleged lack of standing to sue, etc., contentions discussed *infra*.

POINT III.

Statutes applicable to defendant, including statutes which confer functions upon the President and Congress respecting defendant's affairs, in no way "preclude" the assertion of plaintiffs' claim.

Referring to Section 10 of the Administrative Procedure Act, defendant argues that "judicial review" is "precluded by statute". Brief, 44.

Plaintiffs contend, on the contrary, that relevant statutes not only do not preclude but positively invite judicial scrutiny of defendant's compliance with its duties. [As noted below, *infra* p. 122, plaintiffs draw a distinction between judicial compulsion of the performance of statutory duties and "judicial review."]

Although plaintiffs believe that judicial compulsion against defendant as an agency of the United States is warranted by the Administrative Procedure Act, their first assertion of jurisdiction is against defendant as a corporation subject to suit without qualification.

Nowhere does defendant even suggest that the courts could not enforce against a private corporation a duty such as that imposed by Section 412.

This Court has warned that, in "the present climate of opinion which has brought governmental immunity from suit into disfavor" and in the light of "expanding conceptions of public morality regarding governmental responsibility," consent to suit against Government corporations should be given "hospitable scope" and "interpolation(s)" should not be made in statutes which provide for suit "without qualification." *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391, 396. This language has been in substance

reiterated in *F. H. A.* v. *Burr*, 309 U. S. 242, and in *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

As we have seen *supra* pp. 90-91, the year before the Act of 1950 Congress modified the Federal Tort Claims Act so that defendant, a corporation with a long history of litigation, could be subject to suit "in the same manner as any private corporation" on its President's representation that "the basic policies underlying governmental immunity from suit [did] not apply [to it]."

Under these circumstances, if Congress intended to immunize a breach of statutory duty from judicial scrutiny it was exceedingly strange that it should impose that duty upon defendant.

Let us examine the statutes to which defendant points.

Public property and Section 4 of the Administrative Procedure Act. Defendant maintains, as evidence of preclusion, that it is its function to manage public property. But all Government corporations manage public property.

We have already referred *supra* pp. 88-89 to the Fleet Corporation cases in which this Court held that the status of a Government corporation as an agent of the President did not lessen its suability. *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549; *The Lake Monroe*, 250 U. S. 246.

Both of these cases concerned the possession of property.

To turn for the moment from considering defendant as a corporation to considering it as a Government agency:

That the subject matter is public property, if anything, advances plaintiffs' contention that judicial enforcement of defendant's statutory duty is appropriate. That the citizen is entitled to judicial enforcement of his statutory rights concerning public property has long been recognized.

An early decision by this Court respecting mandamus was the famous case of *Marbury* v. *Madison*, 1 Cranch, 137. Although that case did not concern public property, Chief

Justice Marshall, discussing the circumstances under which it would be *obvious* that a mandamus should be granted, chose for illustration a hypothetical case relating to the public lands, a case in which a citizen was entitled under a statute to a patent for lands "above the mouth of the Kentucky River", but the Secretary of State refused to give it to him. 1 Cranch, 165.

In the course of our nation's history the distribution of Government lands, especially in the West, made judicial enforcement of the citizen's rights respecting public property a most familiar subject of litigation in which the citizen's rights were repeatedly enforced against public officers. Later in this brief, in our demonstration that the citizen can enforce the performance by a Government agency of a statutory duty involving discretion, we shall cite cases respecting public lands. *Infra* pp. 124-125. Also, showing the judicial construction of the expression "subject to the approval of", we rely on cases respecting public lands. *Infra* pp. 109-111.

Section 4 of the Administrative Procedure Act. Defendant also refers to Section 4 of the Administrative Procedure Act, exempting agencies from rule-making procedures respecting "matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts".

This argument proves too much. Can it be seriously contended that Government corporations are exempted from suits respecting such "matters"?

Moreover, this statutory provision is in the Administrative Procedure Act itself. Assuming what we deny, that the Act can be applied to limit the suability of Government corporations, why not say so in those sections of the Act providing for judicial review if it were intended to limit

judicial scrutiny in these respects? Why put the limitation in Section 4 in such oblique fashion?

Further, it would be most anomalous that the Administrative Procedure Act, a statute intended to regularize and expand judicial review, should impliedly preclude a suability otherwise existing. Thus this Court noted in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41, that "any exception we may find to [the Act's] applicability would tend to defeat this purpose". In *Heikkila* v. *Barber*, 345 U. S. 229, 232, the Court assured the bar that it would maintain "a judicial attitude of hospitality towards the claim that Section 10 *greatly* expanded the availability of judicial review". In *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, the Court repeated that it would give an "hospitable" interpretation to the Act, stating that the purpose of Section 10 was to remove obstacles to judicial review of agency action (at p. 51).

The role of the President. Defendant maintains that Congress looked to the President to enforce defendant's duty to prescribe tolls (Brief, 49, 52, 56). The District Judge twice asserted that the President could compel defendant to prescribe tolls (R. 225, 230) and apparently deduced therefrom that it was not, in some measure and in this case, within the province of the courts to do so.

As the "executive Power" of the United States is "vested" in the President (Constitution, Article II, Section 1), as it is the President's duty "to take Care that the Laws be faithfully executed" (ibid. Section 3), and as the officers of the United States have tenure at his pleasure, *Myers* v. *United States*, 272 U. S. 52, the President is in a position to compel all officers and agencies of the executive branch to perform their duties.

Yet the authority of the courts to compel that performance is well-settled. The argument that the

President's power excluded that of the courts was definitively overruled in *Kendall* v. *United States,* 12 Pet. 524, in which a writ of mandamus was granted against the Postmaster-General. The Court said at pp. 612-13:

> "It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice."

It is, plaintiffs respectfully submit, unrealistic to think that the President will have the time to get after defendant. As Professor Rossiter has demonstrated in his work *The American Presidency,* the President today is Chief of State, Chief Executive, Leader of Foreign Policy, Commander-in-Chief of the Armed Forces, Chief Legislator, Chief of Party, Voice of the People, Protector of Peace, Manager of Prosperity and Leader of the World's Free Nations.

At R. 228, footnote 28, the District Judge quotes a passage from *Marbury* v. *Madison,* 1 Cranch, 137, 171, and italicizes two clauses which hold that the courts may compel an executive officer to do acts "in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid."

In this instance the defendant agency is distinctly *not* under the particular direction of the President; in fact defendant is considerably less under his direction than is usual in the executive branch. By Section 247 as amended by the Act of 1948 management of defendant is vested in a board of directors, who are appointed by the "stockholder". Under Section 246(a) the President appoints the stockholder. The President's control is thus a step removed, and there is nothing in the statute to suggest that the President's power of direction is other than general.

We have already, *supra* pp. 88-89, described the Fleet Corporation cases in which the Court held that the status of that Corporation as agent of the President did not lessen suability. *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549; *The Lake Monroe*, 250 U. S. 246.

The role of Congress. *The Government Corporation Control Act.* Defendant maintains that it is immune from suit because, it says (Brief, 49-53), financial affairs are regulated by Congress under the Government Corporation Control Act.

Again the argument proves too much. All wholly-owned Government Corporations are required to submit budget programs to Congress. Does this mean that they are all immune from suit with respect to estimated income?

31 U. S. C. §849 defines the purpose of the submission of budget programs and the effect of their approval. That purpose and effect are to make "available for *expenditure* for operating and administrative expenses such corporate" and appropriated moneys as Congress sees fit. Thus Congressional action on budget programs is an approval of expenditures, comparable to an appropriation—it does not purport to relate to income, let alone to immunize from judicial scrutiny the ways by which the various corporations get the income they have estimated.

If there could be any doubt on this score it would be removed by the language of the appropriation acts. Defendant cites these acts (Brief, 137) but significantly does not quote them.

In each of the acts cited by defendant the actual language was as follows:*

> "The following corporation [referring to defendant] is hereby authorized to make such expenditures, *within the limits of funds and borrowing authority available to it and in accord with law* . . . as may be necessary in carrying out the programs set forth in the Budget for the fiscal year" etc.

In short, what Congress said to defendant was in substance, "To the extent that you can get the money lawfully you can spend it as you propose".

The possibility of conflict with the courts. Defendant also conceives the possibility of a conflict between Congress and the courts, with Congress telling defendant to do one thing and the courts telling defendant to do another. Plaintiffs cannot take these fears seriously.

All that the Court of Appeals attempted to do was to enforce what it found to be the will of Congress as evidenced by the Act of 1950. If Congress is not satisfied with that finding, or believes that under present conditions some different arrangement should be made, there is nothing in the Court of Appeals decision to prevent it from enacting some new statute in other terms.

It is difficult to see how defendant's argument is not equally applicable to the judicial enforcement of any act of Congress. If it is valid, the courts could never enforce any statute.

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* Department of Commerce and Related Agencies Appropriations Acts for 1956, 1957 and 1958; 69 Stat. 235-237, 70 Stat. 322-324, 71 Stat. 78.

The inaction of Congress during the pendency of this case. Because Congress has not changed the statute during this case, defendant deduces that Congress approves its refusal to prescribe tolls. It might equally well be argued that Congress's inaction ratifies the construction of the statute by the Court of Appeals. Indeed that Court seemed to find support for its construction of the Act of 1950 in the failure of Congress to adopt the recommendation of the Comptroller General that the Act be amended to permit charging the losses of the business activities against tolls (R. 240).

The fact that the previous statute did not provide for judicial review. Defendant finds such preclusion in the fact that the "pre-existing statutory plan" precluded judicial review (Brief, 54-55).

When Congress enacted a statute by which the duty to prescribe tolls was transferred from the President to an agency of the United States that was also a corporation subject to suit without qualification, it must have taken for granted, in the light of the suability of Government corporations and the Administrative Procedure Act, that compliance with its statutory duty could be compelled by the courts. Cf. *supra* pp. 88-91, 93.

POINT IV.

The Section 411 proviso for the approval of the President means only that the President should himself "take Care" that defendant "faithfully executed" Section 412 in prescribing tolls. The proviso neither effected an "unlimited delegation" of tolls-making power, nor authorized the President to consider non-statutory factors nor constituted defendant a mere adviser. The legislative history, the statutory background, the language and arrangement of the statute, the law of rate-making, the character of the non-statutory factors, anomalous and violative of the Hay-Pauncefote Treaty, which the defendant proposes that the President consider, and the Constitution, unite to require this construction. The premise upon which defendant argues that it may not be compelled to act or to pay damages is therefore false. Nor was the approval requirement provided to protect the shipping industry.

Defendant has built its theory of the case on that clause of Section 411 providing that tolls prescribed by defendant shall be approved by the President. Defendant maintains, and persuaded the District Judge, that by this clause Congress made an "unlimited delegation" (R. 227) of its toll-making power to the President.

Thus, according to defendant, tolls-fixing is a matter of executive policy to be decided by the President in his absolute discretion. Defendant, we are told, is a mere adviser.

This claim by defendant poses a central issue in the case.

Plaintiffs maintain, on the contrary, that Congress determined policy by Section 412. Defendant was made the agent of Congress to carry out that policy; the President, in accordance with Article II, Section 3 of the Constitution, was designated to make sure that any toll fixed by defendant carried out that policy correctly.

Consequently Sections 411 and 412 bring into play the well-settled principles of judicial enforcement applicable to the administration of statutory policy by the executive branch and independent agencies. These principles are wholly contrary to defendant's theory that the tolls are a matter of executive policy authorizing the President to set tolls on "bases" other than those specified by statute.

Plaintiffs will demonstrate that by all criteria—legislative history, statutory background, the language and arrangement of the statute, the law of rate-making and the Constitution—the President's review power under Section 411 should be so construed.

A. The legislative history abounds with evidence that Congress intended by the Act of 1950 to establish policy, and did not intend to abdicate policy by the Section 411 proviso, which was barely mentioned.

B. The statutory background: Congress has always kept control of tolls policy.

C. The arrangement of the statute: Section 411 deals with procedure, Section 412 with policy.

D. The language of the statute: The words "subject to the approval of" ordinarily mean that the officer whose approval is required shall sanction the act of another according to law; the broader meaning given those words in *Chicago & Southern Airlines* reflects differences in both substance and procedure and not the fact that the President was the reviewing officer.

E. Under the law of rate-making, the rate-making authority executes a policy laid down by the Legislature.

F. The character of the non-statutory factors which defendant proposes that the President consider is anoma-

lous. For him to use the toll rate for purposes of domestic transportation policy and foreign policy would violate the nation's good faith and the Hay-Pauncefote Treaty.

G. To construe the Section 411 proviso as requiring the President to see to it that any toll prescribed by defendant conforms to law fits precisely with the Constitutional definition of his duty; if it is an "unlimited delegation", it is unconstitutional.

H. The review power was not provided to protect the American shipping industry.

A. The legislative history abounds with evidence that Congress intended by the Act of 1950 to establish policy, and did not intend to abdicate policy by the Section 411 proviso, which was barely mentioned. We have already reviewed the legislative history twice in Part One, first in Point I, to show that Congress intended that tolls be calculated on the basis of the Canal activity only, *supra* pp. 34-40, and again in Point IV, to show that Congress intended to adopt a new permanent policy to be put into effect at the time of the transfer of the Canal to defendant, and not at defendant's pleasure, *supra* pp. 69-74. The able and forceful review of the legislative history by the Court of Appeals at R. 245-249 also demonstrates the intent of Congress to establish policy. It would therefore be unnecessarily repetitive to review the legislative history again here.

Despite the constant references in House Resolution 44 and Committee reports and testimony to statutory tolls policy, defendant argues from the Presidential review clause in Section 411 that tolls are executive policy and the defendant a mere adviser.

This review clause was barely mentioned in the legislative history, as the Court of Appeals twice notes (R. 247, 248).

Defendant has culled out and quoted the two references in the legislative history to the President's review power (Brief, 55, 66-67). We find nothing in these references inconsistent with our theory of the review power. In both instances the Bureau of the Budget said, once directly, and once by its representative, Mr. Seidman, that the President's approval power was necessary because tolls were related to national transportation policy. In other words, it was because of the *importance* of tolls that review by the President was required. Neither the Bureau study nor Mr. Seidman made any suggestion that the President was at liberty to disregard the statutory tolls policy the Bureau itself proposed.

In one of these references Mr. Seidman spoke of the review power *and the public hearing* as "safeguards" (R. 109). Does this mean that the public hearing and therefore defendant itself may take into account non-statutory factors? Even the District Judge agreed that "new tolls, if they are prescribed, must conform with Section 412" (R. 217). Hearings are to make sure that a statute is properly carried out, *Morgan* v. *United States*, 298 U. S. 468, 479-480, and the purpose of the President's review power is the same.

Full appreciation of the assumption by all concerned in the formulation of the Act of 1950 that the statutory policy would govern tolls-fixing can only be gained, of course, by reading the full legislative history, an arduous task. However, the minutes of the last hearing, that before the Senate Armed Services Committee, forcefully convey that conclusion and are printed in the Record almost in full (R. 104-164). Possibly members of the Court may wish to glance through these minutes.

Perhaps of special significance is the fact that the final Committee reports (House, Appendix C, 14a-17a; Senate,

R. 164-167) both describe the bill as establishing tolls policy; the Senate report does not even refer to the President's review power. And the 1949 House Merchant Marine report recommending that the Bureau of the Budget study Panama Canal organization and tolls policy, referred to the then existing legislation as follows: "It is strange that the fixing of tolls should be the responsibility of the President" (Appendix I, 43a).

In its comment on this case the Harvard Law Review aptly summed up the legislative history as follows (71 HARV. L. REV. 544-545):

> "The time and effort devoted to perfecting the formula and the consideration given by the committees to proposals from various interested parties demonstrate that Congress was seeking a permanent and stable toll program."

How inconsistent that Congress should simultaneously make tolls a matter of executive policy with respect to which its formula should be merely a helpful hint to be disregarded by the President at his pleasure!

The true purpose of the proviso. The proviso merely states a power that the President has, in any event, under the Constitution, which he may exercise if he chooses. By Article II, Section 1 of the Constitution the "executive Power" is "vested in a President". By Section 3 it is the President's duty "to take care that the laws be faithfully executed". In *Myers* v. *United States*, 272 U. S. 52, the Court held that, by the necessary implication of these sections, a statute depriving the President of the power to remove officers of the United States at his pleasure was unconstitutional.

Undoubtedly, the purpose of the proviso was to make sure that the matter came to the attention of the President, not

to confer a power that did not otherwise exist. The administration of the Government is so gigantic and complex that the President cannot be expected personally to oversee every operation, as this Court observed in far simpler days more than a century ago, in *Williams* v. *United States*, 1 How. 290, 297. Hence special provision was necessary.

To be realistic, let us recall that the proviso was originally proposed by the Bureau of the Budget (R. 102), a body that has come to audit and correlate the performance of their functions by the executive departments. The proviso meant that before the rate went into effect the Bureau would have a look at it, circularize such interested departments as State, Commerce and Justice, and make sure that defendant's officers had not committed some error of law or economic prediction, a precaution probably deemed necessary because of the commercial and international aspects of defendant's tolls.

But this review power did not mean that the President, in exercising it, could disregard Congressional policy and substitute a different one of his own. This we have already shown respecting the legislative intent, and we shall further demonstrate the proposition by discussion of other criteria.

B. The statutory background: Congress has always kept control of tolls policy. Congress has at all times regulated tolls policy, although permitting the President a limited discretion within the framework of that policy. It would be most extraordinary that Congress, with this long tradition, should suddenly, and in the most offhand manner, abdicate that policy.

The successive statutes are the Act of August 24, 1912 (37 Stat. 560, 562-563), the Act of June 15, 1914 (38 Stat.

385-386), the Act of June 19, 1934 (48 Stat. 1122) and the Act of August 24, 1937 (50 Stat. 750); they are collected in Appendix B to this brief, pp. 10a-13a.

No President has ever regarded himself as the maker of tolls policy. On the contrary, both Presidents Wilson and Franklin D. Roosevelt, by recommending certain tolls policies to Congress, as described *supra* pp. 83-84, and awaiting the action of Congress, showed that they regarded Congress as the arbiter of tolls policy.

C. The arrangement of the statute: Section 411 deals with procedure, Section 412 with policy. The provision for the approval of the President is found in Section 411 dealing with procedure entitled "Authority to prescribe measurement rules and tolls", as distinguished from Section 412, dealing with policy, and entitled "Bases of tolls".

Thus Section 411 authorizes defendant to prescribe measurement rules and tolls, provides that those prevailing at the time of enactment shall be effective until changed, stipulates for six months' notice during which a public hearing is to be held, and requires the approval of the President.

Section 412 provides for a specific tonnage basis of tolls calculation, directs that tolls be prescribed so as to cover interests and costs of canal operation, requires toll credits for transits by Government ships, subjects tolls to Article 3, Section 1 of the Hay-Pauncefote Treaty, and forbids the inclusion of interest during construction in the interest calculation.

If it had been intended that the review power should affect policy, that power would have been provided in Section 412.

D. The language of the statute: The words "subject to the approval of" ordinarily mean that the officer whose

approval is required shall sanction the act of another according to law; the broader meaning given those words in *Chicago & Southern Airlines* reflects differences in both substance and procedure and not the fact that the President was the reviewing officer. Certainly the ordinary meaning of the word "approve" is that the approving person makes sure that he whose action is to be approved has acted rightly; it does not mean that the approving person is to do the thing himself if he doesn't like what has been done. The ordinary meaning is especially valid where he whose action is to be approved is required to act according to a defined procedure and standard.

As the Court said in *People* v. *Board of Education*, 258 Ill. App. 271 (1st Dist.), at p. 279, the phrase, "subject to the approval of" "negatives the idea" of "unlimited and uncontrolled power and authority".

The expression "subject to the approval of" has frequently been before this Court in cases involving the public lands.

In *Wisconsin R. Co.* v. *Price*, 133 U. S. 496, the Court held at p. 511 that the expression required the officer in question, the Secretary of the Interior, to make a "judicial" examination of the applicable law and facts.

In the frequently cited case of *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, the Court said at p. 388 that the grant of such authority "involved not only the power but implied the duty *to determine the lawfulness* of the" action subject to approval (land selections).

In *Stalker* v. *Oregon Short Line*, 225 U. S. 142, the Court considered a statute conferring a "right to take" subject to the approval of the Secretary of the Interior. The Court said at p. 148:

> "When, therefore, the railroad company has exercised its 'right to take' a particular tract for station

purposes, by filing a survey and plat of the ground selected, the Secretary of the Interior is *called upon to interpret the law under which the right to take is claimed, and to determine the lawfulness of the taking,* as of the time when the right was asserted by the filing of the plat and survey".

In *Payne* v. *New Mexico,* 255 U. S. 367, the Court, referring to the words "subject to the approval" etc., said at p. 371: "Their purpose is to *cast upon the Secretary the duty of ascertaining whether the selector is acting within the law,* in respect of both th land relinquished and the land selected, and of approving or rejecting the selection accordingly".

This Court has also declared what "subject to the approval of" does *not* mean.

In *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, the Court held that such authority did *not* "clothe" the designated officer with "discretion" "to substitute his judgment for the will of Congress as manifested in the granting act" (p. 236).

In *Daniels* v. *Wagner,* 237 U. S. 547, the Court sarcastically described the very argument now advanced by defendant as follows: "That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law" (p. 558).

Other characterizations of the review power have been made in *Northern Pacific Ry. Co.* v. *McComas,* 250

U. S. 387, 393 ("sound, but not arbitrary, discretion"), *Orchard* v. *Alexander,* 157 U. S. 372, 383 ("not arbitrary and unlimited"); *Cornelius* v. *Kessel,* 128 U. S. 456, 461 ("not an unlimited or an arbitrary power").

It is true that in *Chicago & Southern Airlines* v. *Waterman S. S. Corp.,* 333 U. S. 103, this Court gave a broader interpretation of that expression as found in 49 U. S. C. §601, but that was because of the different nature of the award of foreign route certificates to air carriers under the Civil Aeronautics Act from rate-making on openly published accounts.

These differences led this Court to conclude that the award of such certificates was, in respect of the function of the President, a matter of executive policy, and not a matter of the administration of legislative policy. But in reaching this conclusion the Court emphasized forcefully the exceptional nature of the statute and its subject matter. *The Court expressly distinguished cases relating to foreign commerce by land and water.* 333 U. S. 107. It would be extraordinary that a decision reached on the very ground of the peculiarities of that case should be made into a precedent overruling the body of law otherwise applicable in situations where those peculiarities did not exist.

Essentially the difference in subject-matter is this: Foreign route certificates for air carriers are a matter of international negotiation. Obviously our Government cannot confer landing rights in a foreign country. Accordingly by 49 U. S. C. §602 Congress has required the participation of the Department of State. Also, the President must be able to retaliate in the event foreign countries discriminate against this nation. Usually only one carrier can be selected. Moreover, "routes and bases should be prudently correlated with facilities and plans for our own national defenses." 333 U. S. 108.

The Civil Aeronautics Act specified certain standards which the Board should apply respecting foreign route certificates preliminary to the submission to the President. 49 U. S. C. §§481, 488. For that reason four members of this Court thought that the decision of the Board could be reviewed, although not that of the President. 333 U. S. 114-115. The majority, however, concluded that because of the requirement that the Board's decisions "shall be submitted to the President *before publication thereof*" (49 U. S. C. §601), the statute had not "contemplated interposition of the courts at this intermediate stage." 333 U. S. 112.

Thus it was on the basis of those features of *Chicago & Southern Airlines* strikingly different from this case as to substance and procedure that led the Court in that case to regard the President's action as a matter of executive policy rather than administration of legislative policy.

At R. 251-252 the Court of Appeals persuasively distinguished *Chicago & Southern Airlines*.

E. Under the law of rate-making, the rate-making authority executes a policy laid down by the Legislature. If the President was to apply the tolls policy of Section 412, then the statutory scheme conforms exactly to traditional rate-making procedures; otherwise, it defies them.

Rate-making has frequently been declared by this Court to be a legislative function. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440-441; *United States* v. *Jones*, 336 U. S. 641, 652.

Article I, Section 1, of the Constitution vests "all legislative Power" in Congress.

The Panama Canal is government property and, of course, under Article IV, Section 3, it is Congress which

is granted power to "make all needful Rules and Regulations" respecting such property.

As is well known, legislative bodies do not ordinarily fix rates directly but enact a policy and confer power on some other authority to carry out that policy and fix specific rates.

This Court has said that in the exercise of its rate-making power Congress customarily lays down "an intelligible principle to which the person or body authorized to fix such rates is directed to conform". *Hampton & Co.* v. *United States,* 276 U. S. 394, 409. In that case the rate-fixing authority was the President.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194, this Court said at p. 214:

> "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

In *Hampton & Co.,* a case relating to customs duties, the Court expressly found at p. 409 that there was no distinction between making interstate commerce rates and customs duties. Certainly no reason can be conceived why the principle should not also apply to proprietary rates, especially proprietary rates with respect to which the United States has an external obligation to make "just and equitable".

This Court in *United States* v. *Grimaud,* 220 U. S. 506, a leading case on administrative functions, also in the field of government property, adopted the same

reasoning as that of the rate cases. This Court said that Congress conferred upon executive officers the power to make regulations "not for the government of their departments, but for administering the laws which did govern" (220 U. S. 517); Congress "was merely conferring administrative functions on an agent, and not delegating to him legislative power" (220 U. S. 516).

F. The character of the non-statutory factors which defendant proposes that the President consider is anomalous. For him to use the toll rate for purposes of domestic transportation policy and foreign policy would violate the nation's good faith and the Hay-Pauncefote Treaty.

The District Judge conceived the Section 411 proviso as constituting an "unlimited delegation" of tolls-making power to the President. The District Judge, like defendant, regarded the statutory prescription of tolls by defendant as mere information which the defendant was to pass on to the President who would fix tolls on the basis of "the needs of the national transportation policy", that is "the competitive balance between steamships and railroads", and on [the needs of] "foreign policy" (R. 227, 233).

Defendant seems to shrink from the expression "unlimited delegation" used by the District Judge to characterize the President's review power. Nevertheless, in explaining the non-statutory factors which, it says, the President may consider, the defendant gives illustrations in the fields of domestic transportation policy and foreign policy and in substance reaches the same result (Brief, 67-70).

Plaintiffs submit that these illustrations, which undoubtedly were the best the defendant could think of, are anomalous. If the President did act on them, he would violate our country's good faith and the Hay-Pauncefote Treaty.

One illustration is the possiblity that reduced tolls might result in a loss of business by the railroads (Brief, 68). Does the defendant seriously maintain that the foreign 70% of Canal traffic can be surcharged in order to bolster up a competing American transportation facility? A rate designed to gratify our notions of domestic transportation policy? Is this the attitude of the "mandatory of civilization"? Is this consistent with the fine assertions of Secretaries Clay, Cass and Blaine that the nation controlling the ship canal should take no selfish advantage? With the splendid declaration by President Cleveland that we had "in advance" "consecrated" the canal to "mankind"?

Not even the representative of the railroads (Mr. Prince), whose lengthy testimony before the Armed Services Committee is in the Record (R. 135-144), urged that such considerations were properly relevant to tolls. Indeed the railroad representative was so devoted to the cost-of-service principle that he urged "very sincerely" that the $1 ceiling in the bill as it passed the House be eliminated because "wholly inconsistent" with the bill's "theory and philosophy" (R. 142).

To pursue the analogy to Suez, is it the position of the United States Government that Egypt may raise tolls at Suez to protect the Egyptian railway system or for some comparable consideration, such as the protection of the pipeline Egypt is said by the public press to plan to build? Egypt has now merged with Syria. May the United Arab Republic adjust tolls at Suez to force an otherwise uneconomic use of the pipelines of Syria? To refer to the holding of the District Judge, does the President of the United Arab Republic have "unlimited" discretion to use Suez tolls for "the needs of foreign policy"? Acceptance of defendant's argument would require affirmative answers to these questions.

Defendant's other illustration is the possible diversion of traffic from Suez by reduced tolls. Similar questions present themselves. Are Suez tolls to be kept high in order to protect Panama? Do Panama and Suez constitute an international waterway combine in which each protects the other's rates? This idea is breathtaking. It is, we believe, without precedent in the considerable literature of these Canals.

Although these questions answer themselves and demonstrate the fallacy of defendant's argument, we cannot forbear comment on the impossibility that Congress could have intended consideration of the non-statutory factors proposed by defendant, which are, as we have said, unquestionably the most plausible that defendant could imagine.

As for the protection of the railroads:

In fact, the amount of dry cargo moving through the Canal, the only freight with respect to which there is rail-water intercoastal competition, has declined from 7,000,000 odd tons in 1939 to 4,000,000 odd in 1953, according to a study published in 1955 by the Maritime Administration entitled "A Review of the Coastwise and Intercoastal Shipping Trades" (pp. 22-23). A number of lines have been forced out of business. It is the intercoastal shipping lines that need relief if they are to continue to exist.

Defendant refers to the national transportation policy defined in the preamble to the Interstate Commerce Act as enacted by Section 1 of the Transportation Act of 1940, 54 Stat. 899 (Brief, 68). According to this preamble, it is the policy of Congress that "all modes of transportation" be so regulated "as to recognize and preserve the inherent advantages of each". If so much foreign traffic goes through the Canal that lower tolls will pay operating costs

and interest, that fact constitutes an "inherent advantage" which it is the policy of Congress to recognize.

It would be ironic if tolls were kept up for any consideration such as defendant proposes. The exemption of intercoastal traffic from tolls provided by the Act of 1912 was repealed because of the obligation to foreign traffic provided by the Hay-Pauncefote Treaty. *Supra* p. 83. Now foreign traffic is so great that tolls may be reduced and still pay cost of service and interest. Are the intercoastal lines now to be told that for the sake of the railroads they cannot have that reduction?

As to the protection of Suez:

The ordinary competition between the Canals is negligible, being confined to a small volume of traffic between Great Britain and Western Australia.

The sharp reductions in the Suez rate since 1948 noted *supra* p. 29 have not caused any loss in traffic at Panama; indeed the traffic has substantially increased. If the Panama rates were reduced 25¢, the annoying possibility envisaged by defendant, *the Panama rate would still be higher relative to the Suez rate than it was either in 1937, when the present Panama rate was fixed, or in 1948, when the agitation leading to the Act of 1950 began.*

During fiscal 1957 the Suez Canal was *entirely closed* for over six months, yet, according to defendant's own analysis, the resultant gain in gross revenues at Panama was less than 10% of the total for the year (defendant's report for 1957, p. 5).

Consideration of such factors would also, we submit, be inconsistent with Article III, Section 1, of the Hay-Pauncefote Treaty.

As the Court of Appeals succinctly noted: "The defendant's decisions are not complicated by factors of diplomacy

or national defense, *since the Hay-Pauncefote Treaty forbids use of the Canal toll rate as a weapon of foreign policy*" (R. 252). The Treaty also, plaintiffs submit, forbids its use for purposes of domestic policy.

To keep rates high because of the needs of the railroads would be discriminatory in favor of our national interest—assuming that such is our national interest. To keep them high for the sake of Suez would be discrimination in favor of the United Arab Republic.

Moreover such criteria are inconsistent with the "just and equitable" tolls provision. Throughout the entire history of the Canal it has been assumed that tolls should be based on cost. *Supra* pp. 45-46. There has been disagreement as to how cost should be calculated, with particular reference to the proper allocation of costs as between the Canal and national defense, the proper interest rate, etc. as evidenced in our reviews of the legislative history in Part One of this brief, but there never has been so far as plaintiffs can discover, any suggestions that any factor other than cost could properly be taken into account. Certainly defendant points to no such suggestion prior to this case. To make rates for the world on the basis of the competing facilities of our nation, or of those of some other nation, would not be "just and equitable."

Conceding that Congress, as a matter of domestic law, may repeal or modify a treaty, *Pigeon River Co.* v. *Cox*, 291 U. S. 138, 160; *Cook* v. *United States*, 288 U. S. 102, 120; *Head Money Cases*, 112 U. S. 580, 597-599, nevertheless a "treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed", *Cook* v. *United States*, at p. 120; cf. *Pigeon River*, at p. 160.

Here it is abundantly clear that no one in Congress intended that the Act of 1950 accomplish any repeal or

modification of the Hay-Pauncefote Treaty. On the contrary, by and for the first time, incorporating Article III, Section 1, in the laws of the United States, that is, in Section 412 (d), Congress showed its intent affirmatively to conform our municipal statute law to the Treaty and to define the "just and equitable" Treaty rate by the Section 412 formula.

This Court has declared itself "bound" to construe a "treaty liberally in favor of the rights claimed under it", *United States* v. *Payne*, 264 U. S. 446, 448-449; cf. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487.

In this background of law plaintiffs submit that the President's review power should be construed to require him personally to enforce the Section 412 formula and not to authorize him to override it for foreign or domestic transportation policy purposes.

G. To construe the Section 411 proviso as requiring the President to see to it that any toll prescribed by defendant conforms to law fits precisely with the Constitutional definition of his duty; if it is an "unlimited delegation", it is unconstitutional. We have already shown that rate-making is a legislative function, that under the Constitution Congress has the legislative power and the President the executive power, that the legislature defines a rate policy and that the executive or an independent agency administers it. As this Court said in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker".

To characterize the Section 411 proviso as an "unlimited delegation" of the rate-making power, as did the District

Judge (R. 227) is to say that it is unconstitutional. In our system there is no such thing as an "unlimited delegation" of legislative power; strictly speaking, there is no such thing as *any* delegation of legislative power.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, this Court held unconstitutional Section 9 (c) of the National Industrial Recovery Act, 48 Stat. 195, 200 by which the President was authorized to prohibit the interstate transportation of oil produced in excess of state permission. Explaining its decision this Court said at p. 430: ". . . the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited".

In that case the lone dissent of Mr. Justice Cardozo agreed with the other members of the Court on this principle. He said at p. 434:

> "I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed".

In the later NIRA case of *Schechter Corp.* v. *United States*, 295 U. S. 495, the Court summarized its conclusion in *Panama Refining* that Congress could not delegate legislative power and continued at p. 530:

> "Accordingly, we look to the statute to see whether Congress has overstepped these limitations, —whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others".

Finding that Congress had not itself established standards, the Court held unconstitutional Section 3 of NIRA, under the purported authority of which the codes of fair competition had been promulgated.

Thus if we construe the Section 411 proviso to confer authority looking to the enforcement of the Section 412 policy, the proviso conforms precisely to the Constitution; if not, then there is no standard and the proviso is invalid.

H. The review power was not provided to protect the American shipping industry. The Court of Appeals suggest that the review power was conferred upon the President to protect the American shipping industry (R. 248). With great respect, we are unable to find any support for that proposition in the references cited by the Court or anywhere else.

On the contrary, we think it clear from the legislative history that the proviso had no such purpose.

In the first place, the suggestion clearly originated in the Bureau of the Budget (R. 102).

In the second place, the shipping industry did propose a very different protective clause in case the formula should work adversely, viz., that tolls should be limited in any event to $1 a ton. This clause was approved by the Merchant Marine Committee and by the House of Representatives and inserted in Section 14 of the bill. However, at the hearing before the Armed Services Committee the limitation was opposed by the representatives of the Department of Defense, the Bureau of the Budget, and of the Association of American Railroads as contrary to the bill's "theory and philosophy" (R. 110, 113, 131-132, 142). The Committee accepted their reasoning and deleted the $1 ceiling as "entirely inconsistent with the principles of this legislation" (R. 165).

This episode serves both to negate the theory that the review power was to protect American shipping and further to evidence the intent of Congress that the formula rate therein provided should be the toll.

POINT V.

Whatever may be the power of the President and whatever plaintiffs' rights of judicial review of tolls determinations, when made, defendant may be compelled to prescribe tolls. Corporations and agencies may be compelled to act, although their action, when taken, is not subject to judicial review, or for any reason may never become effective. This rule is applicable to administrative procedures of which the final outcome is Presidential action not subject to judicial review.

The proposition stated in the heading was considered by the courts below the major issue on the jurisdictional phase of the case.

Plaintiffs take sharp issue with defendant's presentation of this question.

Defendant speaks of judicial review.

What defendant seeks is judicial compulsion of procedures required by law. The cases are very clear that the compliance with statutory procedures will be compelled in circumstances in which the result reached by those procedures is not subject to judicial review.

Defendant, continually speaking of the approval of the President, seems to imply that where Presidential action is the final outcome of statutory procedures, the usual authority of the courts to compel action is not available.

Plaintiffs submit that no such exception exists, and that defendant's premises are fallacious.

No assurance of any effective result: In *Virginian Ry.* v. *Federation,* 300 U. S. 515, the issue was whether a court could compel the defendant, a railway company, to "treat with" a labor union, as required by §2, Ninth of the Railway Labor Act. The defendant argued that a decree would be idle because nothing in the statute required that negotiations result in agreement. This Court overruled that argument in a passage of particular importance because it based its decision on the analogy to the power of a court to compel administrative action which, when taken, was not subject to judicial review. Thus the Court said at p. 551:

> "Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion. It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, United States *ex rel.* Greathouse *v.* Dern, 289 U. S. 352, 359; to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority. Interstate Commerce Comm'n *v.* Humboldt S. S. Co., 224 U. S. 474; Louisville Cement Co. *v.* Interstate Commerce Commission, 246 U. S. 638; see Work *v.* United States *ex rel.* Rives, 267 U. S. 175, 184; Wilbur *v.* United States *ex rel.* Kadrie, 281 U. S. 206, 218".

Thus *Virginian Ry.* holds that a corporation or an agency can be compelled to perform a statutory duty involv-

ing discretion if there is reasonable likelihood that benefit to the plaintiff will result.

We demonstrated in Part One that enforcement of the statute would result in very considerable benefits to plaintiffs.

Defendant suggests that the President might deprive plaintiffs of the benefits of the statute by forbidding a statutory toll on the basis of non-statutory factors.

Plaintiffs have shown, Point IV, *supra,* that it is the duty of the President to enforce the law and that he does not enjoy an "unlimited delegation". But even if we are wrong on that point, it is most unlikely that the President would on the basis of the non-statutory factors set aside a statutory rate; cf. *supra* pp. 116-117. The numerous professions by the highest officials of the Government disapproving "barriers to trade" and expressing devotion to world trade and to the rule of law respecting international waterways, would be made to appear hollow indeed by any such action.

No power of court review; power of Presidential review. In the *Virginian Ry.* case, this Court cited: "Wilbur *v.* United States ex rel. Kadrie, 281 U. S. 206, 218". The obvious reference was to the following passage at 281 U. S. 218:

> "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to *compel action,* when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way . . ."

The *Wilbur* case concerned an application for a mandamus against the Secretary of the Interior. Although the writ was not granted in that case, there have been, of

course, a great many writs of mandamus against the Secretary of the Interior issued or upheld by this Court. Of particular interest are *Payne* v. *Central Pacific Ry. Co.*, 253 U. S. 228; *Payne* v. *New Mexico*, 255 U. S. 367, 372-373; *Wilbur* v. *Krushnic*, 280 U. S. 306, 319. In these cases the Secretary exercised his discretion on the basis of an erroneous construction of the controlling statute. The courts construed the statute correctly, and remanded the case to the Secretary for the exercise of his discretion on the correct construction of the statute. Similar judicial action against defendant seems necessary to reach a lawful toll.

These writs have been issued against the Secretary of the Interior and other executive officers despite the fact that what they do is subject, implicitly if not explicitly, to the approval of the President, as we have shown in Point IV, A, *supra* pp. 106-107.

Our research has not disclosed any litigated case in which the Secretary of the Interior did submit his decision to the President for approval. However, there can be no doubt that at a time when land claims were active and many writs were issued, the Secretaries of the Interior were guided by the President. Chief Justice Taft, who wrote the opinion in the *Myers* case, had, when President, participated in consideration of the Cunningham mining claims after they had become publicly controversial in the agitation against Secretary of the Interior Ballinger. Pringle, *Life & Times of William Howard Taft*, 470-514. His predecessor, President Theodore Roosevelt, had been active in conservation and close to Secretary of the Interior Garfield and his rulings on claims. Pringle, *Theodore Roosevelt*, 430-431; Theodore Roosevelt, *Autobiography*, 412.

Action, when taken, subject to review by court other than the ordering court. In *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, cited by

this Court in the *Virginian Ry.* case, the Court of Appeals of the District of Columbia granted a mandamus to compel the Commission to act in a case which the Commission had regarded as beyond its jurisdiction. This Court affirmed. The Commission argued that its erroneous "non-action" could only be reviewed by the United States Commerce Court (a court created by the Act of June 18, 1910, 36 Stat. 539, to review decisions of the Interstate Commerce Commission, and abolished by the Act of October 22, 1913, 38 Stat. 208, 219). The Court, at 224 U. S. 484, asserted that "the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the Commerce Court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute * * *."

In short, the courts of the District of Columbia had power to compel the Commission to act, despite the fact that power of review of any action taken was located elsewhere.

Louisville Cement Co. v. *Interstate Commerce Commission,* 246 U. S. 638, also cited by this Court, follows the *Humboldt Steamship Co.* case.

Unreviewable action. In *Delaware & Hudson R. Co.* v. *Williams,* 129 F. 2d 11 (C. A. 7th), the Court granted a mandatory injunction compelling a Division of the National Railway Adjustment Board to proceed with the arbitration of certain labor disputes, overruling the Board's contention that it could not be compelled to act because its conclusions were not reviewable. The Court said at 129 F. 2d 16:

> "Appellees contend that the division is an administrative tribunal whose orders are the result of its advised discretion. It therefore can not be compelled to proceed and make an award. The fallacy of this

reasoning arises out of the failure to distinguish between the action of the court in compelling an administrative tribunal *to act*, and a proceeding to compel the administrative tribunal to act in a *particular way*. Courts may not determine *how* the administrative tribunal shall act. They may, however, compel such body *to act*".*

Other cases to the same effect include *Hospoder* v. *United States*, 209 F. 2d 427 (C. A. 3d), in which the Court compelled agency action expressly declared by statute to be final; cf. *Safeway Stores* v. *Brown*, 138 F. 2d 278, 280 (Em. Ct. App.); *American Chain Co.* v. *Federal Trade Commission*, 142 F. 2d 909 (C. A. 4th).

CHICAGO & SOUTHERN AIRLINES AND OTHER CASES CITED BY DEFENDANT IN NO RESPECT LIMIT JUDICIAL POWER TO COMPEL PERFORMANCE OF STATUTES LEADING TO UNREVIEWABLE ADMINISTRATIVE DETERMINATIONS; THAT POWER HAS, ON THE CONTRARY, BEEN EXPRESSLY RECOGNIZED IN CASES INVOLVING ADMINISTRATIVE PROCEDURES LEADING TO UNREVIEWABLE PRESIDENTIAL ACTION.

Defendant and the District Judge have so emphasized *Chicago & Southern Airlines* v. *Waterman SS. Corp.*, 333 U. S. 103, in support of the thesis that the District Court lacked jurisdiction to compel defendant to act as to require extended discussion of that case. We submit that, as demonstrated by the Court of Appeals (R. 251-252) and *infra*, that case is wholly irrelevant.

1. *The present suit is to compel action, not to review a determination.* A preeminent distinction is that in *Chicago & Southern Airlines* the petitioner sought to review action "finalized by Presidential discretion", 333 U. S. 112, not to

* Emphasis by the Court.

compel administrative procedure specified by statute preliminary to that action.

The Civil Aeronautics Board, the administrative body involved in that case, had acted—it had not delayed the performance of its statutory duty for over six years. There is nothing in *Chicago & Southern Airlines* to suggest that the courts could not compel performance in the event of unreasonable delay; on the contrary there is a remark, to which we shall later advert, suggesting that the courts could compel performance.

The District Judge's misconception, as plaintiffs see it, is shown by his statement in footnote 30 that "*McGrath* v. *Kristensen*, 340 U. S. 162, must, of course, be distinguished". Plaintiffs did not cite *Kristensen;* in their view it is irrelevant because relating to judicial review of administrative determination, not judicial compulsion of administrative action.

Comment made by the Court of Appeals on *United States* v. *George S. Bush & Co.*, 310 U. S. 371, also cited by defendant, is also applicable to *Chicago & Southern Airlines* (R. 254):

> "Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the Bush decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President."

2. *Jurisdiction over procedure, the issue here, is recognized in Chicago & Southern Airlines and upheld in related and subsequent cases concerning administrative procedures leading to Presidential action not subject to judicial review.* *Chicago & Southern Airlines,* like the other authorities cited by defendant on this phase of the case, *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294 and *United States* v. *George S. Bush & Co.,* 310 U. S. 371, in no way questions the power of the courts to compel administrative agencies to proceed according to statute and it is a question of procedure with which we are now concerned. Nor has *Chicago & Southern Airlines* been regarded by the Court of Appeals of the District of Columbia as immunizing from its scrutiny the procedure of the Civil Aeronautics Board in foreign route certificate cases prior to action by the President.

In *Norwegian Nitrogen Products* this Court wrote an opinion 28 pages long in considering the procedure followed by the Tariff Commission, which it upheld. The question was as to the validity of tariff rates prescribed by the President. The Court evidently regarded it a necessary prerequisite to validity that the subordinate agency comply with statutory procedures. The opinion was wholly unnecessary if the fact of unreviewable Presidential discretion immunized the proceedings of the subordinate agency.

In *George S. Bush & Co.* this Court's decision assumed that the President and the Commission had followed the procedures prescribed by law. The Court so noted at p. 380, and counsel for the United States predicated his argument upon the regularity of its proceedings, saying at 310 U. S. 372:

> "The action taken by the President and the Commission was in substance one stage of the legislative process. Norwegian Nitrogen Products Co. *v.* United

States, 288 U. S. 294. *Such action is not subject to judicial impeachment if the prescribed forms of legislation have been regularly observed.* Id. Here the investigation conducted by the Commission, the hearings which it held after due notice to all interested parties, its report to the President, and his proclamation approving the Commission's recommendation, constituted a full and regular observance of the forms prescribed."

Defendant also cites p. 166 of *Marbury* v. *Madison*, 1 Cranch, 137. At p. 166 this Court upheld the power of the court to compel the performance of legislative commands, as distinguished from matters wholly of executive policy.

In *Chicago & Southern Airlines* itself this Court began its description of the case at 333 U. S. 105: "*By proceedings not challenged as to regularity*, the Board, with express approval of the President, issued an order . . ."

In two cases subsequent to *Chicago & Southern Airlines* the Court of Appeals of the District of Columbia assumed it had power to compel procedure on foreign route certificate applications.

In *Pan American-Grace Airways* v. *Civil Aeronautics Board*, 178 F. 2d 34, that Court sustained on the merits a CAB order refusing to proceed with such an application. The rationale of the Court's opinion takes for granted that the Court could order the Board to proceed in the event of unreasonable delay.

Thus even in a case unquestionably within the doctrine invoked by defendant the Court of Appeals of the District of Columbia has found that it could grant the relief plaintiffs seek here.

In *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 777, the Court dismissed an appeal from an order denying intervention in foreign route certificate

proceedings on the ground that the order was interlocutory because not "dispositive of petitioner's application", and not on the ground that the eventual outcome of the proceeding would be an unreviewable order of the President.

Defendant cites *United States Overseas Airlines* v. *Civil Aeronautics Board*, 222 F. 2d 303. But that case involved judicial review after the President had acted, not judicial compulsion of procedures preliminary to that action.

United States Overseas Airlines does differ from *Norwegian Nitrogen Products* in that, after the President's action, the Court refused to consider claims of procedural irregularity. The rationale of this difference is perhaps the fact that under the Tariff Act, as here, the President was administering legislative policy, whereas the Civil Aeronautics Act made route certificates a matter of executive policy.

3. *Chicago & Southern Airlines differs from this case in many other ways.* *Chicago & Southern Airlines* was carefully distinguished by the Court of Appeals (R. 251-252), as we have already noted, *supra* p. 127. That case involved foreign policy respecting air commerce on secret intelligence, not rate-making for water transportation on openly published accounts.

POINT VI.

Defendant's various distinctions and excuses, that the statute is not "peradventure clear," that rate-making is discretionary, that defendant has been thinking about the toll rate, that to apply the statute would cause a deficit which Congress did not expect, etc., are invalid because of faulty reasoning and false premises.

Assuming what we deny, that the statute is not "peradventure clear," that fact does not excuse defendant from performing its duty. Plaintiffs regard the statute as abundantly clear, Part One, Point I, *supra* pp. 31-33. However, for the purposes of defendant's argument we shall assume that it requires some interpretation.

Not available to a corporation. In its argument on this point defendant cites not a single case against a corporation, Government or private, in which the court failed to apply its own construction of the statute, and accorded any weight to the corporation's construction—as such. Government corporations are entitled to no favors in litigation. *Supra* p. 90.

Defendant has no expertise in statutory administration. Defendant relies on *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, and like cases. These are cases in which an agency with great experience in the administration of a particular statute or group of statutes had made a careful bona fide effort to reach a conclusion. This Court decided not to interfere.

But defendant is a corporation whose primary function is the physical operation of the Canal and various business activities, not the administration of statutes.

Defendant's law officer apparently agrees with plaintiffs' construction of the statute. The only official of defendant who could be expected to have competence in the interpretation of statutes is its General Counsel. He apparently agrees with plaintiffs, *supra* p. 42.

The Administrative Procedure Act requires the court to form its own opinion. Assuming, as defendant does, that its corporate status is to be disregarded, and that it is to be treated solely as an agency of the United States, then Section 10(e) of the Administrative Procedure Act applies (5 U. S. C. §1009):

> "So far as necessary to decision and where presented *the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions . . .*"

The Court of Appeals did not hold that absorption of the losses of business activities was "reasonable from the naked words." Defendant makes much of the remark by the Court of Appeals that defendant's interpretation of the statute was "reasonable from the naked words" (R. 245). What the Court referred to, as the context makes clear, was the theory that putting the statute into effect was a matter of the defendant's contentment. The Court of Appeals had not the slightest trouble holding that the Act did not "give defendant's board of directors *carte blanche* to ignore the statutory mandate whenever the defendant's other business ventures were losing money" (R. 249). Nevertheless defendant quotes the "reasonable from the naked words" expression in a context that would suggest that the Court of Appeals had referred to the absorption of the losses of the business activities.

As we have noted *supra* p. 68, even the "content" theory was not advanced by the defendant, but was conceived by

the District Judge. The Court of Appeals apparently assumed the District Judge had adopted arguments by defendant. Defendant itself has shown little confidence in the "content" theory despite its promulgation by the District Judge.

As a rule the courts give little heed to agencies' pleas to exemption from statutory duties on the ground that the statute requires construction. The plea that an agency should be exempted from compliance with a statute because the statute requires construction is frequently made—perhaps as a matter of routine. Nevertheless in countless cases involving statutory construction the courts have granted relief against agencies.

A memorable passage in *Roberts* v. *United States*, 176 U. S. 221, at p. 231, points out that any "officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform . . ." But, the Court continues, also at p. 231, that does not make his duty to perform it any the less subject to enforcement by the courts.

The rather long passage to which we refer is so highly regarded by the Court that it has been quoted in full in no less than four subsequent cases, *Ballinger* v. *Frost*, 216 U. S. 240; *Lane* v. *Hoglund*, 244 U. S. 174; *Work* v. *McAlester-Edwards Co.*, 262 U. S. 200, and *Wilbur* v. *Krushnic*, 280 U. S. 306.

In all of these cases this Court compelled the performance of duties respecting public property, and the opinions took pages of statutory construction to ascertain the existence of those duties.

That its rate-making involves discretion, and that it was "authorized" to prescribe tolls do not excuse defendant's failure to perform. *The alleged discretion.* Defend-

ant argues rate-making is "... complicated and involved," *New York* v. *United States*, 331 U. S. 284, 335 (Brief, 74).

That is true when many different distances, kinds of service and types of traffic are involved, as in railroad or shipping rate-making, but that fact did not prevent this Court from ordering performance of a statutory duty to prescribe rates. *Interstate Commerce Commission* v. *Humboldt SS. Co.*, 224 U. S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638.

In this instance there are only two types of traffic, laden ships and ships in ballast—really only one, as almost all the traffic is in laden ships. There is only one route, i.e., through the Canal, and only one service, i.e., transits. Defendant states its costs annually in advance, in its budget program.

It was because of the extreme simplicity of setting tolls that the duty to do so was conferred on defendant. The Bureau of the Budget recommended (R. 102):

> "Provided that there is agreement as to the formula [i.e., the statutory formula] for establishing tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors."

And the Armed Services Report contained a kind of work sheet less than a page long computing a toll rate (R. 167).

Undoubtedly prescribing tolls according to Section 412 does involve limited factors of discretion, or judgment, but so does all rate-making. *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1, 26, *infra* p. 182. But as we have shown in Point V, corporations and agencies

may be compelled to perform statutory duties involving the exercise of discretion.

The word "authorized". Defendant seeks to excuse itself from its duty under Section 412 because it was "authorized" to prescribe tolls by Section 411. Part One, Point IV, answers this argument, *supra* pp. 68-84, esp. p. 79.

If it be that the statute requires construction as to the basis upon which defendant should exercise its discretion, that fact does not deprive the courts of jurisdiction. At Point I, B, 1, c (Brief, 78-89) defendant makes various arguments the precise point of which eludes us.

If defendant is contending that the courts lack jurisdiction to compel it to perform its statutory duty because the statute requires construction as to the basis upon which the defendant should exercise its discretion in prescribing tolls, the proposition is demonstrably unsound.

Thus in *Payne* v. *New Mexico*, 255 U. S. 367, a case in which the citizen's rights respecting public property were enforced against an agency, this Court upheld a decree which enjoined the Secretary of the Interior and the Commissioner of the General Land Office "from canceling or annulling a lieu land selection . . . under a mistaken conception of their power and duty" (p. 368), and instructed them to make "a disposal of the selection in regular course unaffected by the elimination of the base tract from the reservation" (p. 373), consideration of that elimination having been an error of law. Cf. *supra* p. 125.

A similar injunction was upheld in *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228; in *Wilbur* v. *Krushnic*, 280 U. S. 306, the Court sustained a writ of mandamus to the same effect.

That defendant has been thinking about tolls does not excuse its failure to prescribe them. Defendant argues

(Brief, 78-79) that it should be excused from prescribing tolls because of "its continuous observation and evaluation of the pertinent data and of its reasoned determination that, according to its interpretation of the facts and the law, a change in the toll rate is neither indicated nor necessary."

But plaintiffs are entitled to have defendant act on the basis of a correct interpretation of the law and the admitted facts. The defendants were compelled so to act in the cases cited in Point V, such as *Interstate Commerce Commission* v. *Humboldt SS. Co.* and *Payne* v. *New Mexico.* The defendants in these cases could have made and perhaps did make the same statement as this defendant.

Significantly defendant does not identify its General Counsel as the official who made the "interpretation" of "law."

If it be that lowering the toll rate would cause a deficit in the business activities, that fact is not an excuse. *The fault is defendant's.* Defendant at pp. 80-82 makes an argument that is in substance an expression of disagreement with the policy of the statute.

What plaintiffs are seeking to do here is to enforce the statutory tolls formula enacted by the Act of 1950.

Defendant makes the excuse that if it did so there would be a deficit in the operating results of the business activities.

It is quite true that Congress did not anticipate any such result because at the time of the legislation that became the Act of 1950 was under consideration the Panama Railroad Company (the New York company) had invariably earned its overhead and large profits in addition. *Supra* pp. 15, 65. Congress was explicitly told by the Bureau of the Budget, without demur by defendant, that the business activities could earn enough to "cover, in the aggregate,

the interest on the Government's investment and the Company's share of the expense of civil government and related activities" (R. 99); cf. *supra* pp. 36-37.

Defendant now says it can not do so—certainly it has not done so.

If therefore a reduction in tolls would disappoint the expectation of Congress that the Company would be fully self-sustaining that is not the fault of world commerce, but of defendant, either for failing to point to Congress the error in the Bureau's estimate, or for its management of the business activities since July 1, 1951.

Certainly, however, it does not constitute a reason for disregard of the statutory command respecting tolls.

Perhaps this is the appropriate place to take issue with defendant's assertion that plaintiffs demand that the business activities be made to pay their way. Plaintiffs make no such demand. Although Congress undoubtedly so anticipated, it did not so command, and plaintiffs' interest is most indirect. What plaintiffs want is that defendant comply with the command of Section 412(b), as to tolls, in which their interest is direct.

No appropriations would have been required. Defendant draws a dire picture of a necessity for appropriations for the business activities if the toll rate were lowered (esp. at Brief, 86). We do not agree that such a result would be so evil; the business activities serve the Armed Forces whose expenses are properly paid from appropriations.

But appropriations would not have been necessary. For the years 1951-1954 the losses of the business activities were $14,807,971 as calculated by the GAO, *supra* p. 55. But in the same period defendant paid $23,957,853 interest and in addition had a net income of $13,028,533. If tolls had been charged in accordance with the formula defendant

would have paid $9,149,882 interest to the Treasury.* In other words, at the statutory rate, which is considerably less than the 90¢ rate, tolls would have paid Canal expenses, including overhead, the expenses of the Zone Government, heavy losses of the business activities, and large sums in interest.

Section 246(c), Title 2, of the Canal Zone Code, as amended by the Act of 1950, anticipates that interest may not be earned in full. Section 246(c) provides for defendant's payments of interest to the U. S. Treasury. The final sentence of this statute reads: "Payments of such interest charges shall be made annually to the extent earned, and if not earned shall be made from subsequent earnings" (Defendant's Brief, 164-165).

The doubtful sincerity of defendant. We cannot refrain from observing that there is every reason to believe that defendant's argument dealt with here is a rationalization concocted after the event. The purpose was to justify what its own General Counsel warned defendant was disobedience of the statute under circumstances that indicate that in defendant's organization it was taken for granted that by proper pricing policies the losses of the business activities could be avoided. Defendant's then President (Brig. Gen. J. S. Seybold) nevertheless overruled General Counsel, withheld his opinion from the Board of Directors, and loaded the losses of the business activities against tolls. *Supra* pp. 42-43. We shall withdraw this suggestion when defendant makes available to the court what it has already made available to GAO, i. e., General Counsel's opinion, and that opinion shows we are mistaken.

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* $23,957,853 plus $13,028,533 minus $27,836,504.

POINT VII.

Plaintiffs had standing to sue. By Article III, Section 1, of the Hay-Pauncefote Treaty, incorporated in municipal law by the Act of 1950, plaintiffs' ships were guaranteed freedom of navigation through the Panama Canal at reasonable rates. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, do not apply.

Plaintiffs had standing to sue, whether defendant be regarded as a corporation subject to suit or as an agency of the United States subject to the body of law applicable thereto, including the Administrative Procedure Act.

Article III, Section 1 of the Hay-Pauncefote Treaty, 32 Stat. 1903, incorporated by reference in Section 412 (d) by the Act of 1950, and in any event the "supreme Law of the Land" under Article VI of the Constitution, provides that "The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules" and that "conditions and charges of traffic shall be just and equitable."

Thus the United States is under a duty to permit the "vessels of commerce" of the world to use the Canal upon the payment of "just and equitable" charges. This duty has devolved upon defendant, as the agency of the United States in possession of the Canal. The coincident transfer of the Canal to a corporation subject to suit and the incorporation of Article III, Section 1 in municipal law by the Act of 1950 are forceful evidence of Congressional policy in this respect.

Plaintiffs' standing to sue defendant, considered as a private corporation. Defendant's challenge to plaintiffs'

standing to sue is predicated on its status as agency of the United States. All Government corporations are agencies of the United States, but, as we have seen *supra* p. 90, they are not entitled to any dispensations in litigation, except as to execution.

The duty to supply service without discrimination and at reasonable rates is the classic characteristic of the public utility. *Munn* v. *Illinois*, 94 U. S. 113.

As shown *supra* p. 90, Congress intended by the Act of July 16, 1949, Public Law 172, 81st Congress, 1st Session, to restore to defendant its former status as subject to suit "*in the same manner as any private corporation.*"

There can be no doubt that the users of a public utility service supplied by a private corporation have status to litigate rates. *Cf. Munn* v. *Illinois*, *supra*; *Arizona Grocery Co.* v. *Atchison Ry. Co.*, 284 U. S. 370, 383; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *cf.* cases cited *infra* pp. 186-187. Indeed rate litigation by users of public services is a well-known branch of the law.

And when rates are defined by law, they have status to litigate the rate so defined, as we demonstrate *infra* pp. 142-143, 187.

When a statute imposes a duty on a corporation that duty may be enforced by mandamus and injunction. *Virginian Ry. Co.* v. *Federation*, 300 U. S. 515, and *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, discussed *supra*, are relatively recent cases in which statutory duties were so enforced.

An earlier decision, apposite to this case, is *Union Pacific R. Co.* v. *Hall*, 91 U. S. 343, a suit in mandamus brought to compel the Union Pacific Railroad to operate its route west of Council Bluffs as one continuous line. This Court overruled the objection that relators did not have standing to sue, saying at p. 354:

> "They (relators) were merchants in Iowa, having frequent occasion to receive and ship goods over the

company's roads; but they had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally. The question raised by the objection, therefore, is whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator".

After discussion of both English and American cases, the Court concluded at p. 355 that there was "a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty". The Court sustained the suit and upheld the mandamus granted by the Circuit Court.

Union Pacific v. *Hall* is not as strong as the present case for there the statute did not define the beneficiaries—the duty was simply owed to the public generally. Here defendant is bound by both statute and treaty to serve the "vessels of commerce" of "all nations observing these Rules".

Users of public services have standing to enforce "statutory" as well as "reasonable" rates by suits invoking the general jurisdiction of the courts. Defendant urges that users of public services may enforce "statutory" rates, as distinguished from "reasonable" rates, only pursuant to special statutory provisions (Brief, 121-125). This is one of defendant's sweeping assertions for which it offers negligible authority, and that readily distinguished; such assertions nevertheless throw on plaintiffs a burden of exposition which lengthens this brief.

There are numerous cases in which courts by exercise of general jurisdiction have enforced the right to statutory rates. Canals: *Perrine* v. *Chesapeake & Delaware Canal Co.*, 8 How. 172; turnpikes: *Winchester Turnpike Co.* v. *Croxton*, 98 Ky. 739; railroads: *Heiserman* v. *Burlington*,

C. R. & N. Ry. Co., 63 Iowa, 732;* *Peters* v. *Railroad Co.*, 42 Ohio St. 275; utility companies: *Richman* v. *Consolidated Gas Co.*, 114 App. Div. 216, affirmed, 186 N. Y. 209.

Defendant endeavors to distinguish the *Richman* case, cited by the Court of Appeals, on the ground that it is a state court case (Brief, 124). However, the standing-to-sue rule, because related to the suability of private people, necessarily involves recourse to state court cases. Cases cited by defendant are not to the contrary.

Defendant's lone authority for its bold claim is *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. But that case held that the provisions of the Interstate Commerce Act for reparations relief forbade recourse to courts of general jurisdiction except in accordance with that Act; in other words, that the Act's reparations scheme superseded the pre-existing reparations scheme. It is a gross distortion of that case to say that it holds that "the user's common law right to reparations is superseded by legislation determining the rates to be charged by the utility" (Brief, 124).

Assuming the rule to be relevant, users of public services may compel the prospective reduction of rates by mandamus and injunction. Defendant makes the claim that the right of the user of public services to lawful rates may be enforced only by suit to collect retrospectively the excess of the rate charged over the lawful rate, and deduces there-

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* The Court said at pp. 738-739:

> "The statute in force at the time of the transaction in question . . . fixed charges which could be lawfully made by railroad corporations for the transportation of property. Charges in excess of those prescribed were unlawful. This statute conclusively determines the charges which shall be considered reasonable . . . All evidence tending to . . . prove that charges higher than those fixed by the statute were reasonable was incompetent."

from that plaintiffs may not enforce prospectively their rights to lawful rates.

We deny that the standing-to-sue doctrine analogy to the liability of a private person is limited to the precise judicial procedure by which the liability of a private person is ordinarily determined. As we read the cases, it suffices that under corresponding circumstances a private person would be subject to some kind of judicially enforced liability.

In any event the contention is without force. Users of public services may litigate rates prospectively.

In *Perrine* v. *Chesapeake & Delaware Canal Co.*, 8 How. 172, referred to *supra* p. 30, this Court held a canal user entitled to an injunction from a court of general jurisdiction to enforce prospectively a statutory rate; in *Richman* v. *Consolidated Gas Co.*, 114 App. Div. 216, 222-223 (1st Dept.), affirmed 186 N. Y. 209, referred to *supra* p. 143, such a court granted a writ of mandamus for that purpose.

And in *People ex rel. Brush* v. *N. Y. Suburban Water Co.*, 38 App. Div. 413 (2nd Dept.), the Court said at pp. 415-416:

> "The appellant's next claim is that the relator cannot be relieved from the payment of exorbitant charges in this proceeding, but he must pay the charges, whatever the appellant may fix, and seek redress by a suit at law to recover the excessive amounts exacted from him. We know no good reason for holding such a rule. In many cases where State Legislatures have sought to compel public corporations, such as carriers, water companies and the like, to render service for inadequate or ruinous prices or rates, the enforcement of the law prescribing such rates has been enjoined by the Federal courts, and the corporations have not been left to seek a remedy by suing the shipper or party receiv-

> ing the service in an action at law for a reasonable compensation. We think the same rule applies equally to both parties, the corporations and the consumers or shippers. If one party is entitled to have the infliction of the wrong prevented, and not be merely remitted to a suit for damages after the wrong has been committed, the other is equally so. There is no more difficulty in determining reasonable rates in a mandamus proceeding than in an equity action."

In *Town of Mamaroneck* v. *N. Y. Interurban Water Co.*, 126 Misc. 382 (Sup. Ct. Westchester Cty.), the Court entertained a suit to enjoin a rate increase announced by a utility company. The Court's opinion said in part, at p. 387:

> "That if the plaintiffs' rights have been invaded and the statute violated as alleged in the complaint, the remedy by injunction as here sought is a remedy available to the plaintiffs and those similarly situated, admits of no doubt. (Whitmore *v.* New York Interurban Water Co., 158 App. Div. 178.) The other remedy available, although not here pursued, is mandamus. (People *ex rel.* Brush *v.* N. Y. Suburban Water Co., 38 App. Div. 413.)"

The Court enjoined the increased rates and directed a refund of any excess over the pre-existing rate collected during the litigation (at p. 414).

In *Salt River Canal Co.* v. *Nielsen*, 10 Ariz. 9, the Court by injunction enforced lawful rates prospectively against a canal company.

In both *Town of Mamaroneck* and *Salt River Canal Co.* the Court granted what plaintiffs seek here, viz., both prospective and retrospective rate relief.

THAT PLAINTIFFS ARE NATIONALS OF THE UNITED STATES IN NO WAY LESSENS THE RELEVANCE OF THE HAY-PAUNCEFOTE TREATY TO THEIR STANDING TO SUE.

Defendant has argued that a national of the United States cannot acquire justiciable rights under a treaty, citing *Skiriotes* v. *Florida*, 313 U. S. 69.

The premise of this argument is unfounded, because Article III, Section 1 of the Hay-Pauncefote Treaty applies to defendant not only by virtue of the Treaty as such, but also by reason of the incorporation of that Section of the Treaty in Section 412(d), a domestic statute, by the Act of 1950.

Moreover, the argument is without force and is in no way supported by *Skiriotes*.

That United States nationals may enforce rights conferred by treaties is attested by such cases as *Warren* v. *United States*, 340 U. S. 523, in which plaintiff recovered against the United States under the Shipowners' Liability Convention, 54 Stat. 1693, *Garcia* v. *Pan-American Airways, Inc.*, 269 App. Div. 287 (2d Dept.), affirmed 295 N. Y. 852, cert. denied, 329 U. S. 741, *Ross* v. *Pan-American Airways, Inc.*, 299 N. Y. 88, and *Indemnity Ins. Co.* v. *Pan-American Airways, Inc.*, 58 F. Supp. 338, in which a domestic corporation successfully asserted a limitation of liability provided by the Warsaw Convention, and *Hidalgo Water District* v. *Hedrick*, 226 F. 2d 1 (C. A. 5th), in which the claim of a domestic municipal corporation under a treaty with Mexico was considered on the merits.

At least one statute assumes that United States nationals may have substantive rights under treaties: 28 U. S. C. §1502.

28 U. S. C. §1502 provides that "except as otherwise provided by Act of Congress" the Court of Claims may not

entertain claims growing out of treaties. *Ex parte Atocha*, 17 Wall. 439, refers to a decision of the Court of Claims upholding the claim of a United States citizen growing out of the Treaty of Guadalupe Hidalgo, entertained pursuant to permissive legislation.

Skiriotes v. *Florida*, relied upon by defendant, not only fails to sustain the defendant's argument, but is, by implication, an authority directly to the contrary. In *Skiriotes* the appellant had been convicted by the Florida courts of an offense committed two marine leagues from the Florida shore. He maintained that under various treaties the territory of the State of Florida extended only one marine league from shore and that the Florida courts were therefore without jurisdiction. This Court overruled appellant's claim, but *not* on the ground that a United States national could not assert a right under a treaty. *The Court assumed that he could.* The rationale of the Court's decision was that the United States, and the individual states thereof, had extraterritorial powers over their citizens, citing *American Banana Co.* v. *United States*, 213 U. S. 347, 355-356; *United States* v. *Bowman*, 260 U. S. 94; *Cook* v. *Tait*, 265 U. S. 47, *Blackmer* v. *United States*, 284 U. S. 421, 437; and *The Hamilton*, 207 U. S. 398.

A matter of intention. Of course treaties may be negotiated and drawn so as not to confer rights upon United States nationals. In the present instance, however, the language of the Treaty admits of no doubt. Freedom of navigation is granted "vessels of commerce and of war of all nations observing these Rules" referring to the Rules stated in Article III. There can be no doubt that plaintiffs' ships come within this language. Defendant makes no contention to the contrary. Defendant is forced to argue that there is something inherent about a treaty by reason

of which a United States national can take no advantage. As we have seen, there is no support for this proposition.

Plaintiffs' standing to sue defendant considered as an agency of the United States. Plaintiffs similarly have standing to sue defendant if it be considered liable solely as an agency of the United States—but, as we have already noted, we deny that defendant can be considered solely so liable.

As Justice Frankfurter said in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152, "A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts."

The Court of Appeals of the Second Circuit took the same view in *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700 (C. A. 2d).

That plaintiffs have a right to litigate rates with defendant considered as a private corporation has already been demonstrated.

Some cases appear to have gone somewhat further. In *Reade* v. *Ewing*, 205 F. 2d 630 (C. A. 2d), the Court held that a citizen who bought margarine for consumption by his family had standing to sue the Federal Security Administrator over an order respecting the labeling of margarine. In *Atchison, Topeka & Santa Fe R. Co.* v. *Summerfield*, 128 F. Supp. 266 (D. C.), the Court held that a group of railroad companies had standing to sue the Postmaster General for a declaratory judgment and an injunction against the transportation of 3¢ postage mail by air.

Section 10(a) of the Administrative Procedure Act confers standing to sue on those "suffering legal wrong because

of any agency action, or adversely affected or aggrieved by such action, within the meaning of any relevant statute." Section 2(a) defines "action" to include "failure to act."

In *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.), the Court held that a consumer of electric power was a person "affected" by a rate order within the meaning of §43-704 and 705 of the District of Columbia Code. The Court said at p. 613:

> "Giving to the words quoted the meaning commonly attributed to them, and assuming that Congress intended to use them in their ordinary and usual sense, there can be no question that a consumer of Potomac [referring to Potomac Electric Power Co.] is a person or corporation affected by the Commission's order".

In that case the Court overruled the contention that under *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, a consumer did not have standing to sue.

So far as we are aware no case has ever held that administrative action injurious to a legal right conferred upon the individual as such is beyond judicial review.

On the contrary the current trend has been to review administrative action in derogation of rights not nearly so specific, so well recognized and so carefully spelled out as plaintiffs'.

Illustrative of this trend are *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, in which the Court held an organization entitled to judicial review of an unfavorable listing made for purposes of screening government personnel, *Harmon* v. *Brucker*, decided March 3, 1958, in which this Court held that an Army dischargee could compel the Secretary of the Army to grant him a proper discharge,

and *Schactman* v. *Dulles*, 225 F. 2d 938 (C. A. D. C.), in which the Court reviewed the denial of a passport.

These and similar decisions reflect the climate of opinion that the citizen should have relief against "administrative lawlessness." *Peters* v. *Hobby*, 349 U. S. 331, 345.

The Court of Appeals well said (R. 255):

> "The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, e. g., Honovich v. Chapman, D. C. Cir., 191 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); Shachtman v. Dulles, D. C. Cir., 225 F. 2d 938 (passport denial); Textile Workers Union of America v. Allendale Co., D. C. Cir., 226 F. 2d 765 (Wash-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. §43a, which overruled Perkins v. Lukens Steel Co., supra, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. §1009(c), 'every final agency action for which there is no other adequate remedy in any [fol. 258] court shall be subject to judicial review.' We think the intent of Congress was to allow judicial review in these circumstances."

The Administrative Procedure Act. Defendant's brief argues the Administrative Procedure Act in great detail. We are somewhat reluctant to introduce a major discussion of the Administrative Procedure Act in this already lengthy brief, for a number of reasons:

1. Defendant's argument disregards its status as a corporation subject to suit.

2. Defendant relies almost entirely on cases decided before the Act, e. g., *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. These cases are readily distinguished, *infra* pp. 151-154.

3. Defendant seeks sharply to narrow judicial review—an attitude wholly at odds with this Court's declarations of sympathy towards the view that the Act is broadly remedial.

4. Plaintiffs' belief that defendant's argument is most unpersuasive is confirmed by the summary dismissal of that argument by the Court of Appeals (R. 255):

> "Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. §1009(a) confers standing on persons 'suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute' and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1950, as well as the Hay-Pauncefote Treaty, as their statutory authority."

Nevertheless, in view of the importance of this case we shall comment on defendant's argument at what we trust is only moderate length.

Alabama Power Co. v. *Ickes and Perkins* v. *Lukens Steel Co. are very different cases from this.* These two cases have become the cornerstone of defendant's argument. They are definitely the cases most frequently cited by defendant—*Perkins*, on 13 different pages; *Alabama Power*, on 9 [next comes *Chicago & Southern Airlines*, on 8; the rest are scattering] (Brief, v-xii). The weakness of defendant's position is forcefully shown by its need to make such heavy use of cases so obviously different.

Perkins and *Alabama Power* are both cases in which, to refer to the test which Justice Frankfurter suggested in *Joint Anti-Fascist Refugee Committee* and the Second Circuit Court of Appeals in *Associated Industries*, the plaintiff could not possibly have brought suit against private persons for the kind of action taken by the defendant government official. Both cases turned on that very ground.

In *Perkins* certain steel manufacturers, planning to bid on government contracts for steel, sued to enjoin enforcement of the terms of the specifications on the ground that they had not been drawn in accordance with the Public Contracts Act.

In *Perkins* this Court said at p. 127:

> "*Like private individuals and businesses*, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases".

But the Government does not enjoy unrestricted power over navigation and rates on the Panama Canal. The Government has restricted itself, and granted rights to plaintiffs, in both these respects by the Hay-Pauncefote Treaty.

This Court also observed at p. 130 that,

> "A like restraint applied to purchasing by *private business* would be widely condemned as an intolerable business handicap".

On the other hand judicial examination of rates for public services supplied by private corporations is familiar.

The contrast in purpose of the respective acts. In *Perkins* this Court further declared at p. 128 that the

"purpose of the Public Contracts Act" was "to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment".

And in *Perkins* this Court emphasized that the legislation in question had not been enacted for the benefit of the respective plaintiffs. 310 U. S. 126. That is, the Public Contracts Act had not been adopted for the sake of steel manufacturers.*

But here both the Hay-Pauncefote Treaty and the Act of 1950 were adopted for the benefit of the plaintiffs and their class. Since 1826 the United States repeatedly professed its desire that there be an interoceanic canal across Central America for the benefit of the world's commerce at reasonable tolls. It made a Treaty to that effect. It entered the Isthmus by "mandate from civilization" to

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* Defendant's reliance (Brief, 118-120) upon the Fulbright Amendment is misplaced. Whether or not the Fulbright Amendment "overruled" *Perkins*, as the Court of Appeals said (R. 255), it certainly was a provision for judicial review in circumstances in which *Perkins* had held such review was not available. Therefore, if plaintiffs have successfully distinguished *Perkins* they necessarily have also shown that the Fulbright Amendment is not relevant, and its only connection can be to show the increasing tendency of Congress to subject administrative action to judicial review.

The colloquy cited by defendant (98 Cong. Rec. 6531) shows Senator Fulbright advised the Senate that the Public Contracts Act was an "exception" to the Administrative Procedure Act. Thus Congress was granting judicial review to a special situation thought to have been excluded from the Administrative Procedure Act. Its action in adopting the Fulbright Amendment, if it can be said to be an interpretation of the Administrative Procedure Act at all, meant that Congress wished persons relatively indirectly concerned with administrative action, such as prospective bidders on Government contracts, to have the judicial review provided by the Administrative Procedure Act which it assumed that persons more directly concerned with such action already had.

accomplish that result. How anomalous it is to argue now that the statutes of the United States relating to tolls may not be availed by shipowners to seek a judicial determination of the toll rate!

The transfer to a corporation subject to suit. Moreover, the Act of 1950, here sought to be enforced, also provided for the transfer of the Canal to defendant, a corporation well known to be subject to suit, a corporation expressly made subject to suit like "any private corporation" by the same Congress only a year earlier. *Supra* pp. 90-91.

The Public Contracts Act had no such feature.

Alabama Power Co. In this case a group of electric power companies with non-exclusive franchises brought suit to enjoin loans by the United States to various municipalities for the construction of electric plants, on the ground that the official in charge lacked constitutional and statutory authority. Unquestionably the municipalities had the lawful right to engage in competition with plaintiffs.

The approach of this Court was as follows at 302 U. S. 480:

> "Can any one who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results".

But any one charged an unlawful rate by a public service corporation can bring suit.

The recent case of *Kansas City Power & Light Company* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), repeatedly cited by defendant in this litigation, adds nothing to *Alabama Power*.

Analysis of Section 10(a) and its legislative history. The soundness of the flat holding below is readily demon-

strated by a simple statement of the criteria for judicial review under the "legal wrong" and "adversely affected" clause of Section 10(a) as applied to the facts of this case. That clause grants judicial review to any persons legally wronged or adversely affected by agency action within the meaning of a relevant statute.

(1) Plaintiffs are persons within the definition of Section 2(b) of the Act—5 U. S. C. §1001(b).

(2) Defendant's inaction is agency action as defined in Section 2(g) of the Act—5 U. S. C. §1001(g).

(3) Plaintiffs are suffering legal wrong and are adversely affected by that agency action because of the economic loss imposed upon them as a result—*F. C. C.* v. *Sanders Radio Station,* 309 U. S. 470, 476-477; *American Power Co.* v. *S. E. C.,* 325 U. S. 385, 390; *Associated Industries* v. *Ickes,* 134 F. 2d 694, 702-706, reversed on other grounds, 320 U. S. 707.

(4) Sections 411 and 412 of Title 2 of the Canal Zone Code as amended by the Act of 1950, and the Hay-Pauncefote Treaty, are relevant statutes, both to the agency action complained of and to the adverse effect asserted by plaintiffs. Indeed, it is hard to imagine how there could be any more relevant provision than the requirement of the Treaty that "conditions and charges of traffic shall be just and equitable."

Having satisfied all the requirements of the legally wronged or adversely affected clause, plaintiffs have standing to sue thereunder as held by the Court below.

We submit that the language relied on by defendant in the letters of Attorney General Clark is substantially more consistent with the holding of the Court below and the

statements of this Court in *Heikkila* v. *Barber*, 345 U. S. 229, 232; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41; and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51, that Section 10(a) expanded judicial review than with the construction urged by defendant that the Section merely restated pre-existing law. The language of the letters is quoted by defendant (Brief, 111-113) herein as follows:

> "* * * this reflects existing law. In Alabama Power Co. *v.* Ickes, 302 U. S. 464, the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are: Massachusetts *v.* Mellon (262 U. S. 447), the Chicago Junction case (264 U. S. 258), Sprunt & Son *v.* United States (281 U. S. 249), and Perkins *v.* Lukens Steel Co. (310 U. S. 113). An important decision interpreting the meaning of the terms 'aggrieved' and 'adversely affected' is Federal Communications Commission *v.* Sanders Bros. Radio Station (309 U. S. 470)".

The logical construction of that language is that the Attorney General cited *Alabama Power, Massachusetts* v. *Mellon, Chicago Junction, Sprunt* and *Lukens* as cases useful in defining "legal wrong", and cited *Sanders* as a case useful in defining persons "aggrieved" and "adversely affected" who would qualify to seek judicial review under the disjunctive portion of Section 10(a), "or adversely affected or aggrieved by such [agency] action within the meaning of any relevant statute". Section 10(a) concededly provides for judicial review to two different classes: (1) those suffering legal wrong and (2) those adversely affected or aggrieved by agency action within the meaning of any relevant statute.

Nor do we see that defendants can derive much comfort from the carefully qualified statements of the Attorney

General that the Administrative Procedure Act "*in general* declares the existing law concerning judicial review" and "*reflects* existing law". We believe it is of considerably greater significance that the Attorney General did not tell the Congress that Section 10(a) was a mere restatement of prior law and that its enactment would be mere supererogation.

Also, the discussion of the legislative history of Section 10(a) as contained in defendant's brief omits salient features in arriving at its conclusion that the section is nothing more than a restatement of pre-existing law.

The House and Senate reports emphasize the "utmost importance" of judicial review and state:

> "It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted."

See S. Doc. 248,* pp. 217, 281-282. Those reports also point out (S. Doc. 248, pp. 212, 275):

> "*It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.* Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board."

Defendant (Brief, 113-115) quotes a colloquy between Senators McCarran and Austin as to the meaning of legal wrong with the statement that Senator Austin actually had in mind the second part of the clause "adversely affected or aggrieved". The quotation in the defendant's brief, how-

* Referring to S. Doc. 248, 79th Cong. 2d Sess., in which are collected the more important materials in the legislative history of the Administrative Procedure Act.

ever, does not go far enough. Following the reference by Senator McCarran to the Attorney General's letter and the citations to *Alabama Power*, *Massachusetts* v. *Mellon*, *Perkins* v. *Lukens Steel Co.*, etc., Senator Austin inquired:

> "Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
>
> "Mr. McCarran. That is correct.
>
> "Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?
>
> "Mr. McCarran. That is true, the Senator is entirely correct in his statement."

Clearly Senators Austin and McCarran understood that Section 10(a) granted review in situations where it had theretofore been available.

The breadth intended for the categories of persons to whom Section 10(a) gave judicial review was also explained as follows by a spokesman in charge of the legislation (Senator McCarran):

> "Mr. McKellar. May I ask the Senator a very general question, which will show that I have not examined the bill with care? Do I correctly understand that the principal purpose of the bill is to allow persons who are aggrieved as the result of acts of governmental agencies to appeal to the courts?
>
> "Mr. McCarran. Yes.
>
> "Mr. McKellar. That is the general underlying purpose of the bill?
>
> "Mr. McCarran. Yes. But let me add, that where a statute denies resort to the court the bill

would not set aside such statute. If a statute denies the right of review, the bill does not interfere with the statute." (S. Doc. 248, pp. 318-319)

The conclusion of defendant's argument addressed to the phrase "within the meaning of any relevant statute" in Section 10(a) is that the phrase was intended by the Congress to mean "where a statute expressly provides judicial review". Since Section 10(a) starts from the premise that judicial review is granted "Except so far as (1) statutes preclude judicial review", that argument amounts to turning the language of Section 10(a) upside down.*

Similarly the interpretation urged by the defendant addressed to that clause of Section 10(a) reading "any person * * * adversely affected or aggrieved by [agency] action within the meaning of any relevant statute, shall be entitled to judicial review thereof" is that the clause means "where a statute expressly grants judicial review this Act does not take it away". Such confusion in language is not lightly to be imputed to the Congress and is, indeed, quite contrary to the obvious purpose of the Act as revealed by its legislative history and to its construction by this Court.

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* Defendant has contended (Brief, 103-104) that to broaden Section 10(a) to permit plaintiffs to sue would permit railroads, shippers and even passengers to litigate tolls. One answer is that the Hay-Pauncefote Treaty mentions only "vessels of commerce". Again, at common law only users of public services may litigate rates; not their customers. The railroads would seem barred by *Alabama Power*. *Massachusetts* v. *Mellon*, 262 U. S. 447, which defendant itself cites (Brief, 112), shows that the courts have no trouble dealing with interests not significant. Further, Rule 23(a) protects defendant from tolls suits in which the complainants are not of sufficient stature to "insure the adequate representation of all."

POINT VIII.

District courts other than the District Court for the District of Columbia have power to grant mandatory injunctions.

Defendant makes the truly amazing argument that the District Court did not have power to grant mandatory relief. Only the District Court for the District of Columbia may grant such relief, defendant argues. We say defendant's argument is "amazing" because the school desegregation program in which the Department of Justice is so active rests almost entirely on the power of district courts to grant mandatory relief.

In *Brown* v. *Board of Education*, 349 U. S. 294, this Court said at p. 301:

> "The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts *to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools* on a racially nondiscriminatory basis with all deliberate speed the parties to these cases".

Thus this Court hypothesized that the District Courts in question—viz., the District Courts for Kansas, Eastern South Carolina and Eastern Virginia as well as Columbia, 349 U. S. 294—had the power affirmatively to compel the admission of the plaintiffs in those cases.

Brown v. *Board of Education* is of more than usual significance because the opinion is devoted solely to the question of relief, the merits having already been decided at 347 U. S. 483, 497.

It is noteworthy that in its representations to this Court in *Brown*, the Department of Justice was unaware of any inability of district courts to grant mandatory relief. According to the Department of Justice, at pp. 23 and 24 of its brief *amicus curiae* in the *Brown* case:

> "Specifically, *the lower courts should be instructed to require the defendants either to admit the plaintiffs*, and other Negro children similarly situated, forthwith to public schools on a non-segregated basis, or to propose promptly, for the court's consideration and approval, an effective program for accomplishing the transition as soon as practicable".

And the desegregation program has proceeded in the lower courts on the basis of either explicitly mandatory injunctions, or "double negative" injunctions. To sustain defendant's contention in this case would seem to jeopardize that program.

Plaintiffs submit that this Court did not, in the *Brown* case, direct decrees that were beyond the power of the district courts. On the contrary, the power of such courts to issue mandatory injunctions against private parties, state officers and agencies of the United States is well-settled.

Defendant, considered as a private corporation, may be compelled to act. Let us recall once more that the purpose of the Act of July 16, 1949 was to make defendant subject to suit "in the same manner as any private corporation". *Supra* p. 91.

In *Virginian Ry.* v. *Federation*, 300 U. S. 515, this Court affirmed a decree made by the District Court for Eastern Virginia which, according to this Court at p. 517, "commanded the Company to treat with the Federation".

As noted *supra* pp. 123-124, this Court at 300 U. S. 551, equated the powers of a district court to grant mandatory relief in equity with those of the courts of the District of Columbia to grant writs of mandamus against Government officers.

In the *Virginian Ry.* case the Court of Appeals discussed the authority of the District Court to issue a mandatory injunction at some length. That Court relied particularly on *In re Lennon*, 166 U. S. 548, in which this Court said that a "court of equity" may "require affirmative action" by writ of mandatory injunction. 166 U. S. 556, referred to at 84 F. 2d 641, 646-647.

Contrary to defendant's suggestion (Brief, 97), these express discussions of the power to grant mandatory injunctions by both this Court and the Court of Appeals show that no one assumed that the district courts' power under 45 U. S. C. §153, First (p), to enforce orders of the Adjustment Board by writ of mandamus applied to Section 2.

In *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, this Court upheld the power of district courts to enforce switching duties by mandatory injunction, saying at p. 535:

> "The switching order here in question compels performance of the primary duty to receive and transport cars of a connecting carrier. That courts may enforce such duties by mandatory injunction, including a preliminary restraining order, has long been recognized".

As authority for this proposition this Court wrote a footnote, also at p. 535, as follows:

> "See Toledo, Ann Arbor, etc., Ry Co., *v.* Pennsylvania Co., 54 Fed. 730, 746; Chicago, Burlington & Quincy Ry. Co. *v.* Burlington, Cedar Rapids & Northern Ry. Co., 34 Fed. 481. Compare Chicago,

Milwaukee & St. Paul Ry. Co. *v.* Iowa, 233 U. S. 334; Covington Stockyards Co., *v.* Keith, 139 U. S. 128; Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343".

In *Covington Stockyards* this court affirmed a decree of the Circuit Court for Kentucky requiring elaborate and diverse affirmative action. 139 U. S. 131-133.

Union Pacific has already been referred to herein, *supra* pp. 123-124.

St. Paul originated in the state courts of Iowa.

Toledo, Ann Arbor and *Chicago, Burlington* are district court cases directly in point and affirmatively approved by this Court by the citation in *Peoria Ry.*

Again, in *Lucking* v. *Detroit Navigation Co.*, 265 U. S. 346, and *Moor* v. *Texas & N. O. R. Co.*, 297 U. S. 101, this Court recognized the power of a district court to grant a mandatory injunction, although holding that it would not interfere with the decisions of the lower courts to refuse such an injunction on the facts of those cases.

A Note published by the Columbia Law Review in 1938, cited by the Court of Appeals, carefully considers the question of mandatory relief in the federal courts. The Court of Appeals cites this Note for the proposition that "the lower federal courts have not been consistent" respecting their power to grant mandatory injunctions (R. 257). Although it is quite true that the courts have not been entirely consistent, the Note demonstrates and concludes that the courts have by a large majority found jurisdiction in cases comparable to this. The author of this Note found 38 cases in which in his opinion plaintiffs had brought suit for mandatory injunctions which were the equivalent of mandamus; in only eight was relief denied on the ground plaintiff was seeking a mandamus; on the other hand in thirty the author maintained

the relief was either granted, or denied on the merits. Footnote 24, 38 COL. L. REV. 907. In the opinion of plaintiffs, seven of these thirty cases, and one of the seven, are too vague or cryptic to support the proposition. We cite the remaining thirty in the footnote below.* It will be observed that many of these cases are suits against United States government officers or agencies. These will be con-

* Cases cited by Columbia Law Review in which mandatory injunctions were granted or considered on the merits: *Gibson Howell Co. v. Helvering*, 80 F. 2d 592 (C. A. 3d) (U. S. agency); *Sturges* v. *Pease*, 48 F. 2d 1035 (C. A. 2d) (U. S. agency); *Loisel* v. *Mortimer*, 277 Fed. 882 (C. A. 5th) (U. S. agency); *Griffith* v. *Vick Grocery Co.*, 272 Fed. 246 (C. A. 6th); *Bulger* v. *Benson*, 262 Fed. 929 (C. A. 9th) (U. S. agency); *Chicago* v. *Fox Film Corp.*, 251 Fed. 883 (C. A. 7th) (state agency); *Gretch Mfg. Co.* v. *Schoening*, 238 Fed. 780 (C. A. 2d); *Spang* v. *Roper*, 13 F. Supp. 840 (E. D. Pa.), reversed on merits sub. nom. *Gosnell* v. *Spang*, 84 F. 2d 592 (C. A. 3d) (U. S. agency); *Asher* v. *Ingels*, 13 F. Supp. 654 (S. D. Cal.) (state agency); *Jackson* v. *Railroad Commission of Texas*, 12 F. Supp. 348 (W. D. Tex.) (state agency); *Knapp* v. *Hyde*, 50 F. 2d 272 (S. D. N. Y.) (U. S. agency); *Armbruster* v. *Wildwood*, 41 F. 2d 823 (D. N. J.) (state agency); *Baucum* v. *Jackson*, 35 F. 2d 248 (W. D. La.), (U. S. agency); *Casper* v. *Dolan*, 30 F. 2d 400 (E. D. Pa.), affirmed, 281 U. S. 610 (U. S. agency); *Wilson* v. *Bowers*, 14 F. 2d 976 (S. D. N. Y.) (U. S. agency); *Hoffman Brewing Co.* v. *McElligott*, 259 Fed. 321 (S. D. N. Y.), order modified, 259 Fed. 525 (C. A. 2d) (U. S. agency); *Stephens* v. *Ohio State Tel. Co.*, 240 Fed. 759 (N. D. Ohio); *Postal Cable Tel. Co.* v. *Cumberland Tel. & Tel. Co.*, 177 Fed. 726 (C. C. M. D. Tenn.); *St. Louis & S. F. Ry.* v. *Cross*, 171 Fed. 480 (W. D. Okla.) (state agency); *Fleischman Co.* v. *Murray*, 161 Fed. 152 (C. C. S. C.) (state agency); *Wiemer* v. *Louisville Water Co.*, 130 Fed. 251 (W. D. Ky.), reversed on other grounds 130 Fed. 257 (C. A. 6th); *Mutual Life Ins. Co.* v. *Boyle*, 82 Fed. 765 (C. C. Kan.), (state agency); *Metropolitan Life Ins. Co.* v. *McNall*, 81 Fed. 888 (C. C. Kan.) (state agency); *Parsons* v. *Marye*, 23 Fed. 113 (E. D. Va.) (state agency).

Cases in which suits for mandatory injunctions were dismissed for lack of jurisdiction: *Stevenson* v. *Holstein-Friesian Ass'n of America*, 30 F. 2d 625 (C. A. 2d); *White* v. *County Democratic Executive Committee*, 60 F. 2d 973 (S. D. Tex.); *Stevens* v. *School District*, 5 F. Supp. 629 (S. D. Miss.) (state agency); *Knickerbocker Ice Co.* v. *Sprague*, 4 F. Supp. 499 (S. D. N. Y.) (state agency); *Finerán* v. *Bailey*, 2 F. 2d 363 (C. A. 5th) (state agency); *Creager* v. *Bryan*, 287 Fed. 362 (S. D. Tex.) (state agency); *Whitaker and Ray Co.* v. *Roberts*, 155 Fed. 882 (C. C. Nev.) (state agency).

sidered in greater detail *infra*. It is further to be observed that, with a single exception, all the cases denying power to issue a mandatory injunction had been brought against state agencies. Certainly that question has been resolved in favor of jurisdiction, and those cases overruled, by *Brown* v. *Board of Education* and the other Negro cases.

The cases cited in this Note are clearly not complete, as evidenced by several cases decided before 1938 and mentioned in this brief, such as *Lennon* and *Peoria Ry.* and cases cited therein, but not referred to in the Note. It is difficult to locate all cases in which mandatory injunctions have been granted, or applications entertained on the merits, because so often jurisdiction is assumed, without discussion, as, for instance, in *Moor* v. *Texas & N. O. Ry. Co.* and *Lucking* v. *Detroit Navigation Co.*, *supra* p. 163.

The Negro cases. In recent years Negro citizens have brought numerous suits against educational institutions to compel their admission as students on equal terms, and against election officials to compel their registration to vote. Uniformly these plaintiffs have sought affirmative mandatory relief, although often the papers for relief have asked for "double negative" injunctions. Many of these cases have been highly publicized; many have been reviewed by this Court.

So far as our research discloses, these cases have invariably been decided on the merits; in most cases the relief has been granted. We have already referred to *Brown* v. *Board of Education*, 349 U. S. 294. Among other recent decisions by this Court are *Lucy* v. *Adams*, 350 U. S. 1, vacating the suspension of a double negative injunction issued by the District Court for the Northern District of Alabama to require the defendants to accept plaintiff as a student at the University of Alabama, and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, requiring the defend-

ants to provide plaintiff "the same treatment as students of other races". In *Lucy* v. *Adams* this Court cited as precedents, among others, *Sweatt* v. *Painter*, 339 U. S. 629, in which this Court held that the plaintiff must "be admitted to the University of Texas Law School", 339 U. S. 636, and, by reversal, required the issue of the mandamus sought by plaintiff in the state courts of Texas to effect that result.

The citation of *Sweatt* v. *Painter* in *Lucy* v. *Adams* indicates that this Court equates the power of a state court to require affirmative action by mandamus with that of a federal district court sitting in equity.

Lower federal court cases in which Negro plaintiffs were, in substance, granted the affirmative relief indicated include *Bryce* v. *Baird*, 201 F. 2d 664 (C. A. 5th) (defendant ordered to register); *Wilson* v. *Board of Superintendents*, 92 F. Supp. 986 (E. D. La.), affirmed 340 U. S. 909 (defendants ordered to admit); *Tureaud* v. *Board of Supervisors*, 116 F. Supp. 248 (E. D. La.), reversed on other grounds, 207 F. 2d 807 (C. A. 5th) (defendants ordered to admit); *Evans* v. *Board of Education*, 149 F. Supp. 376 (D. Del.) (defendant ordered to submit plan of integration); *School Board* v. *Allen*, 240 F. 2d 59 (C. A. 4th) (defendant ordered to admit); *Clemons* v. *Board of Education*, 228 F. 2d 853 (C. A. 6th) (defendant ordered to admit).

It will be borne in mind that the expression "ordered to admit" refers to decrees which in practical effect required defendants to provide plaintiffs and their class with a nondiscriminatory education.

These cases, taken together and in connection with *Brown* v. *Board of Education*, show a consistent assumption that district courts have the power to compel affirmative action by a defendant not an officer or agent of the United States.

Defendant, considered as an agency of the United States, may be compelled to act. Section 10 of the Administrative Procedure Act relates to "Judicial Review of Agency Action". Subsection (b) covers "Form and venue of proceedings" as follows:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or *mandatory injunction*) in any court of competent jurisdiction . . ."

By this language Congress certainly assumed, if it did not grant, power to issue writs of mandatory injunction against agencies of the United States. The Administrative Procedure Act was enacted in 1946, eight years after the Columbia Law Review Note to which we have referred. That Note summed up the law respecting Government agencies as follows (38 COL. L. REV. 911-912):

> "Where it is sought to coerce federal officials the cases are unanimous in considering the merits of the controversy".

The Note cited those cases against Government agencies which we have indicated in the footnote *supra* p. 164, in support of this proposition.

Describing these cases the Note said (38 COL. L. REV. 910):

> "Federal officials have been ordered to issue licenses to: act as pilot, prescribe liquor for medicinal purposes, withdraw alcohol, transport oil, and register automobiles, as well as to deliver revenue stamps for bar".

The Note continued:

> "State officials have been compelled to issue permits to: engage in the insurance or railroad businesses, or to exhibit motion pictures . . ."

The cases in which these mandatory injunctions were issued are also listed appear in the footnote *supra* p. 164.

This being the state of the law when the Administrative Procedure Act was adopted, it seems clear that Congress assumed that the district courts generally had power to grant writs of mandatory injunction, certainly against agencies of the United States.

The prohibition cases. The National Prohibition Act contained provisions similar to Section 10(a) of the Administrative Procedure Act authorizing "review" by a "court of equity" of refusal by the prohibition authorities to issue permits for the use of liquor and of "specially" (i. e. only slightly) denatured alcohol, and of their revocation of such permits after issuance. National Prohibition Act, Title II, §§ 5, 6, 9; 41 Stat. 309-311; 27 U. S. C. A. (1927 ed.) §§ 14, 16, 21. These provisions led to much litigation in courts other than those of the District of Columbia, of which a frequent result was a mandatory injunction to compel the prohibition authorities to issue or to reinstate such permits and in which applications for such relief were considered on the merits. So far as our research discloses, in no case was suit for such relief dismissed for lack of power to grant a mandatory injunction. Many of these cases are digested in the annotations to 27 U. S. C. A. (1927 ed.) §§ 14, 16, 21. Cf. *Ma-King Products Co.* v. *Blair*, 271 U. S. 479; *Daub* v. *Moss*, 47 F. 2d 603 (C. A. 2d); *Hart* v. *Yellowley*, 284 Fed. 245 (C. A. 2d); *Wynne* v. *Eureka Beverage Co.*, 56 F. 2d 516 (C. A. 3d); *Triborough Chemical Corp.* v. *Doran*, 44 F. 2d

626 (E. D. N. Y.); *D. P. Paul & Co.* v. *Medon,* 24 F. 2d 738 (S. D. N. Y.); *Rock* v. *Blair,* 13 F. 2d 1004 (S. D. N. Y.).

In *Ma-King Products Co.* v. *Blair, Commissioner of Internal Revenue,* a case decided by this Court and procedurally typical, the plaintiff's "prayer was that the Court review the Commissioner's action, reverse his findings as to fact and law, and *direct him to approve the application and grant the permit.*" This Court affirmed a decree which dismissed the bill on the merits, and not for want of jurisdiction. The Court's opinion took jurisdiction for granted and construed the statute as providing the same measure of review that would be available in any event. 271 U. S. 480.

DEFENDANT'S CITATIONS ARE NOT RELEVANT.

Defendant relies largely on ancient cases obviously overruled by *In re Lennon, Virginian Ry., Peoria Ry., Brown* and other decisions of this Court.

Defendant's modern cases relate almost exclusively to United States agency personnel matters. But, as noted in *Alley* v. *Craig,* 97 F. Supp. 576 (D. Me.), Section 10 of the Administrative Procedure Act did not provide for review of problems of personnel. "The review contemplated [by Section 10] pertains only to administrative orders or rulings of an agency carrying out its functions" (p. 578).

POINT IX.

It was orderly procedure for the Court of Appeals to direct the entry of summary judgment.

Defendant's grievance against the decision by the Court of Appeals to grant summary judgment is a repercussion of a clever move made by defendant at the outset of the case.

After plaintiffs had moved for summary judgment defendant made a cross-motion for summary judgment, but sought to avoid its being treated as such by calling it a motion to dismiss for want of jurisdiction. The apparent purpose of defendant's tactic was to secure for its motion a preliminary and separate hearing. Nevertheless, both District Judge Walsh and the Court of Appeals, recognizing defendant's motion for what it was, treated it as a cross-motion for a summary judgment. Accordingly the Court of Appeals properly proceeded as if both motions were before it.

What happened was as follows:

On October 28, 1955 Judge Edelstein issued an order to show cause, returnable December 6, 1955, why summary judgment should not be entered in plaintiffs' favor (R. 10-12). On November 14, 1955, at defendant's request, the return day was adjourned by consent until January 5, 1956 (R. 2)—114 days after the service of the complaint and 69 days after the order to show cause. Defendant sought no further adjournment.

[Meanwhile, as defendant notes in its Brief at p. 132, plaintiffs commenced certain discovery proceedings, largely to get the opinion of defendant's General Counsel referred to at R. 58 by the General Accounting Office. Cf. *supra* pp. 42-43. Defendant has always claimed that these proceedings were inconsistent with the motion for summary judgment, but plaintiffs regard it as proper amplification of the GAO report, one of the moving papers (R. 14), to show the precise language by which defendant's General Counsel expressed his agreement with plaintiffs' construction of the statute.]

On December 16, 1955 defendant served notice of a motion to dismiss, purportedly for want of jurisdiction,

supported by the affidavit of Mr. Leavenworth Colby, Chief of the Admiralty Section of the Department of Justice (R. 185-195).

As examination of Mr. Colby's affidavit will quickly reveal, the affidavit went far beyond questions of jurisdiction and argued such matters as the reasonableness of defendant's delay, the ripeness of plaintiffs' claim, etc. (R. 191-195).

Under these circumstances plaintiffs at a hearing on December 20, 1955 before Judge Walsh strenuously maintained that the defendant's motion, supported as it was by affidavit referring to facts not relevant to jurisdiction, was in substance a cross-motion for summary judgment (R. 203-204).

When Judge Walsh said at the December 20 hearing that he would first consider defendant's motion at a hearing to be held on December 29, 1955, plaintiffs at once and in open court submitted their affidavits in support of their motion for summary judgment as answering affidavits to Mr. Colby's affidavit, the order to show cause being bound with the affidavits. The court clerk then handed plaintiffs' affidavits to Judge Walsh, who replied: "All right, I have got the affidavits to work with already" (R. 206). He then asked when he could get the briefs (R. 206).*

In their brief to the District Court plaintiffs again argued that defendant's motion was in substance a cross-

* Defendant refers to the action of Judge Bicks in marking plaintiffs' motion "off" on January 5, 1956. After the argument before Judge Walsh on December 29, plaintiffs' chief counsel understood that all matters were pending before that Judge. Neither he nor any other representative of plaintiffs attended court on January 5. Presumably the motion appeared on the calendar as a result of the stipulation of November 14, which had been filed in the clerk's office (R. 2), and as a matter of routine, and presumably Judge Bicks marked the motion off because there was no appearance for the motion.

motion for summary judgment, citing 2 Moore, *Federal Practice* (2d ed. 1951) 2247-2255; *Nielson* v. *Farley*, 26 F. Supp. 948 (S. D. N. Y.); *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (C. A. 2d) and other cases. Plaintiffs further urged in their District Court brief (p. 12) that "having disposed of these preliminary objections, your Honor proceed with their motion for summary judgment", and argued that motion at pp. 13-39 of their brief.

When defendant advanced numerous non-jurisdictional arguments in its District Court brief, plaintiffs contended in their reply brief (p. 15):

> "Defendant cannot eat its cake and have it too. Plaintiffs submit that the Court should either treat defendant's motion strictly in accordance with its terms, and disregard arguments directed to the merits and to the validity of the complaint, or else treat it as a motion for summary judgment under Rule 56 and simultaneously entertain plaintiffs' motion for summary judgment."

Judge Walsh's opinion shows conclusively that he regarded and treated defendant's motion as one for summary judgment.

Thus the greater part of his opinion is devoted to his construction of the Act of 1950 as meaning that compliance with the statute was a matter of defendant's pleasure (R. 217-225). Such construction is of course an exercise of jurisdiction. He further found that plaintiffs lacked standing to sue (R. 231). This Court has ruled in the most explicit terms that the question of standing to sue does not go to jurisdiction. *Smyth* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326, 328.

When the case was in the Court of Appeals the Appendix to Plaintiffs' Brief included the papers on the two motions

as if they had both been before the District Court. Defendant made no objection at all. This Appendix has been filed in this Court with defendant's petition for certiorari.

Under these circumstances the Court of Appeals properly regarded the proceedings as constituting cross-motions for summary judgment both of which were then before it.

Judge Clark, the author of that Court's opinion, is a leading expert in federal judicial procedure. He taught pleading and procedure and has written extensively on that subject. *Who's Who in America,* 1956-1957, p. 475. He has been a member of and reporter for this Court's advisory committee on Federal Civil Procedure since it was organized in 1935. His appointment was presumably in recognition of his learning in this field and of the articles on "Federal Civil Procedure" which he and Professor James W. Moore, author of *Federal Practice* but then a research Fellow at the Yale Law School, published at 44 YALE L. J. 387, 1291. These articles pointed out the opportunities available to this Court by reason of the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. §§723b, 723c (Code of 1911), authorizing it to promulgate rules of procedure in civil cases. It seems a little too much to think that Judge Clark did not know what he was doing in the way of federal court procedure.

POINT X.

If and to the extent that the order of the President should embody an error of law, it is subject to judicial review. The Canal Zone Code, taken together with the Administrative Procedure Act, differs from the Tariff Act and the Civil Aeronautics Act. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51.

We do not regard this point as at issue at this stage of the case and we would expect that after defendant's "duty" and "the principles on which it should proceed" are "finally adjudicated" by this Court (Harlan, J., R. 261), there will be no further need for litigation. Nevertheless, we believe it appropriate to show that defendant's premise with respect to *Chicago & Southern Airlines* is untenable as to reviewability as well as to procedure.

The Section 411 proviso, read in the abstract, might be thought to have any of the following meanings:

1. That the President could set any rate he chose, according to his arbitrary whim of fancy, beyond judicial review—the "unlimited delegation" of the District Judge.

We have demonstrated under Point IV that the proviso cannot have such a meaning.

2. That the President is bound to apply the law, using his own discretion with respect to what is "practicable", "appropriate" etc. as provided in Section 412 (b), but that his action is beyond judicial review.

3. That the President's action is subject to judicial review so far as errors of law are concerned.

We submit that meaning 3 must be adopted.

Section 10(a) of the Administrative Procedure Act subjects all administrative action to judicial review unless "preclude[d]."

As we established under Point IV it was the duty of the President, under the Section 411 proviso, to see to it that a tolls prescription by defendant complied with the statute and sound discretion.

To confer an approval power on an executive officer does not preclude judicial review of his action. Under Point IV we cited a number of cases in which selections of public lands were "subject to the approval of the Secretary of the Interior", and in which it was held that his power was "judicial", "to determine the lawfulness" of the selection, and "to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law". His performance of that function was invariably held subject to judicial review. *Supra* pp. 109-111.

Section 10(c) provides that there shall be judicial review of "final agency action."

Most significantly, defendant said at p. 30 of its brief in the Court of Appeals:

> "The President's approval thus constitutes the 'final agency action' (cf. Shaughnessy *v.* Pedreiro, 349 U. S. 48, 51)."

Thus defendant, at that time, appeared to recognize that the President's approval was subject to review under the Administrative Procedure Act, especially by its immediately subsequent citation of *Shaughnessy*.

In *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, this Court considered the provision of the Immigration and Nationality Act of 1952, 66 Stat. 281, 8 U. S. C. §1101, that deportation orders of the Attorney General shall be "final". The

Court held the orders subject to judicial review, saying at p. 51:

> "Such a restrictive construction of the finality provision of the present Immigration Act would run counter to §10 and §12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act. And as the Court said in the Heikkila case, the Procedure Act is to be given a 'hospitable' interpretation. In that case the Court also referred to ambiguity in the provision making deportation orders of the Attorney General 'final'. It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part . . ."

Plaintiffs submit that the enactment of the Administrative Procedure Act and the difference in the subject-matter and the statutory schemes distinguish the Act of 1950 from the Tariff Act, as construed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371, and the Civil Aeronautics Act as construed in *Chicago & Southern Airlines* v. *Waterman SS. Corp.*, 333 U. S. 103, holding the action of the President not subject to judicial review.

We shall now consider the objections to such review more or less articulated at various times by defendant:

> (a) That there is something peculiar and exalted concerning the office of the President which precludes judicial consideration of his acts;
>
> (b) That the words "final and conclusive" indicate a Congressional intent that the courts should not correct his errors of law;

(c) That the President's absence from this suit precludes such correction.

(a) *The courts may consider the lawfulness of the acts of the President.*

In *U. S. Sugar Equalization Board* v. *P. De Ronde & Co.*, 7 F. 2d 981 (C. A. 3d), the Court regarded it as especially appropriate that the courts review the acts of the President for errors of law. The case concerned the alleged failure of the President to comply with "Public Resolution No. 89, 67th Congress", by which the President had been "authorized to require" the Board to take over a certain transaction of De Ronde. The President construed the Resolution as permissive, not mandatory. The Court, holding the Resolution mandatory, upheld an injunction against the Board which had the effect of forcing the President to direct the Board to take over the transaction. The Court said at pp. 986-987:

> "It may be that President Harding thought that this resolution was permissive, but the President, like the Secretary of the Treasury, or any other executive or administrative officer has to construe every act passed by Congress to be enforced by him. Such construction is not final and may be judicially reviewed at the instance of those injuriously affected thereby, and if this resolution is finally declared to be mandatory, its mandates will doubtless be carried out, for 'it is always to be presumed that a public officer will do whenever called on what the law requires of him'. Hoff *v.* Jasper County, 110 U. S. 53. *And this is especially true of the President of the United States,* whose constitutional duty it is 'to take care that the laws be faithfully executed'."

Other cases to the same effect include *Little* v. *Barreme*, 2 Cranch, 170, in which this Court held a naval officer liable

in tort for the seizure of a ship, although he had acted in compliance with an order of the President, the officer's Commander-in-Chief, that order being unlawful; *Francis* v. *Francis*, 203 U. S. 233, in which this Court held void a condition inserted by the President in a land grant because the condition was not authorized by law; *Humphrey's Executor* v. *United States*, 295 U. S. 602, in which this Court held unlawful the President's removal from office of a member of the Federal Trade Commission; and *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, in which this Court held unlawful the defendant's seizure of certain steel mills pursuant to the order of the President, because that order was not authorized by law.

(b) The words "final and conclusive" in the Section 411 proviso do not bar judicial review.

In *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C.), the Court considered this question and said at p. 453:

> "In dealing with other sorts of legislation, the Supreme Court had repeatedly held that the word 'final' does not necessarily exclude, or limit to habeas corpus, judicial review of administrative action. Estep *v.* United States, 327 U. S. 114, is an example. Accordingly it had become common before 1952 for Congress, when it wished to preclude or restrict judicial review, to do so by express language and not to rely on the word 'final'. Section 601 (e) of the Revenue Act of 1936, 49 Stat. 1740, provided that 'The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination'. A 1940 amendment of the World War Veterans Act of 1924, 54 Stat. 1197, 38 U. S. C. §11a-2, provided that 'the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits * * * shall be final and conclusive and no other official or

> any court of the United States shall have power or jurisdiction to review any such decisions'. A 1941 Excess Profits Tax amendment, 55 Stat. 26, provided that certain determinations of liability by the Board of Tax Appeals (now the Tax Court of the United States) 'shall not be reviewed or redetermined by any court or agency except the Board' " . . .

In the *Rubinstein* case the Court asserted that "the Supreme Court had repeatedly held that the word 'final' does not necessarily exclude, or limit to habeas corpus, judicial review of administrative action," citing the *Estep* case "as an example" (*supra* p. 178).

Another example is of special interest here because it concerned a statute using the same expression as the Section 411 proviso, viz., "final *and conclusive*".

United States v. *Williams*, 278 U. S. 255, and *Reynolds* v. *United States*, 292 U. S. 443, involved determinations made under §310 of the Adjusted Compensation Act, 43 Stat. 121, as amended 44 Stat. 826, as follows (278 U. S. 257):

> "The decisions of the Secretary of War, the Secretary of the Navy, and the Director, on all matters within their respective jurisdictions under the provisions of this Act (except the duties vested in them by Title VII) shall be *final and conclusive*".

In *Williams* this Court sustained the Director because his decision was not "wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious".

On the other hand in *Reynolds* this Court held that the claimant was entitled to relief saying at p. 446:

> "The undisputed and indisputable facts bring the veteran within the requirements of the statute. Undoubtedly, therefore, as matter of law, he was entitled to the hospital facilities of St. Elizabeths,

and if timely application had been made to the director of the bureau, a refusal upon his part to order the hospitalization would have been wholly without evidentiary support, clearly arbitrary and capricious, and would not, upon well settled principles, have concluded the courts" . . .

(c) *The President's absence from a suit against defendant does not preclude the correction of his errors of law in the exercise of his approval power under the Section 411 proviso.*

This Court has long taken the view that subordinate officers carrying out the orders of higher authority may be sued respecting those orders if "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Williams* v. *Fanning*, 332 U. S. 490, 494 (local postmaster subject to suit to enjoin order of Postmaster-General); *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86 (local director of Wild Life Service subject to suit to enjoin enforcement of regulation of the Secretary of the Interior); *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (local director of immigration subject to suit to enjoin deportation order of Commissioner of Immigration).

In *Youngstown Sheet & Tube Co.* v. *Sawyer*, the District Court expressly applied this doctrine in a suit against the Secretary of Commerce carrying out an order of the President. 103 F. Supp. 569, 576. This Court affirmed the District Court's injunction without discussion of the point. 343 U. S. 579.

In the cases cited *infra* p. 194, to which the Secretary of the Interior was not a party, this Court held erroneous orders of the Secretary of the Interior respecting land grants subject to his approval.

Obviously relief can be afforded these plaintiffs by a "decree expending itself" on defendant.

PART THREE.

The defendant is liable for overcharges.

I. Once it is determined that under the Section 411 proviso it is the President's duty to enforce the law and not his privilege to disregard the law, there is an adequate basis for assessing damages.

II. Congress showed its intent that defendant make reparation for overcharges by imposing on defendant, a corporation fully subject to suit, a duty violation of which gives rise to a cause of action for damages. Doctrines applicable to regulatory agencies are not available to defendant; the President is not a necessary party.

III. Failures to provide relief for excessive tolls collected in the past would reward concealment and obstruction, frustrate Congressional and Treaty intent, and give an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

POINT I.

Once it is determined that under the Section 411 proviso it is the President's duty to enforce the law and not his privilege to disregard the law, there is an adequate basis for assessing damages.

The difficulty found by the Court of Appeals in fixing damages was that "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant (R. 257). Defendant repeats this argument (Brief, 145), saying that the President must "take into account matters of national transportation policy, foreign relations, local and world-wide trade, and national defense." We have demonstrated, Part Two, Point IV, *supra* pp. 102-122, that the Act of 1950 established a tolls policy which it was the duty of the President to enforce, not his

privilege to disregard. The calculation of the amount of tolls collected from plaintiffs in excess of the statutory rate is not difficult or is, at least, within permissible limits.

The toll rate necessary to pay the cost of Canal operation can be readily ascertained—in fact, it has been ascertained by the General Accounting Office. Defendant intimates that it disputes some of GAO's allocations. What defendant disputes plaintiffs do not know because defendant has never made public its own allocations of general corporate expense. In any event defendant tenders no issue, and plaintiffs can conceive none, that could not be readily solved in accordance with accepted legal principles.

The only impediment at all is that the statute contemplates that tolls be fixed prospectively while a court would determine damages retrospectively. However, that is true in all rate cases.

In *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1, this Court, at p. 26, spoke of the "flexible limit of judgment which belongs to the power to fix rates." In other words, rate-making always involves a certain amount of discretion—there is always a certain leeway in determining what is "reasonable." But that in no way precludes judicial scrutiny of the result.

When such scrutiny ascertains that the rate charged exceeded the lawful reasonable rate, damages are allowed in the amount of the excess or "overcharge," despite the fact that by law the wrongdoer had the power and duty to fix rates prospectively. In the interests of brevity we have eliminated a demonstration of this proposition contained in a draft of this brief prepared before receipt of defendant's brief, as defendant's brief appears to concede the proposition (Brief, 139). Cf. *infra* p. 186.

Certainly the situation is well within the rule laid down by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

This rule has been followed in cases requiring far more speculation than is necessary here. Cf. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

The courts have the capacity to act. Because this Court has held that the courts are not fitted to select air carriers for foreign routes, on secret data involving foreign policy and national defense, defendant seems to think the courts have lost that ability which they have had for centuries to deal with rates (Brief, 145-146).

Not only did the courts determine rates at common law; subsequently they enforced statutory rates, *supra* p. 142. The time came when the determination of the reasonableness of rates against the claim that a fair return was not provided became familiar judicial business. The lower federal courts were largely barred from such litigation by the Act of May 14, 1934, 48 Stat. 775, now 28 U. S. C. §1342, but it continues in the state courts.

The suggestion that the courts are unable to enforce a rate statute as specific as Section 412, involving only a single distance, a single service and almost only one class of traffic, is not persuasive.

POINT II.

Congress showed its intent that defendant make reparation for overcharges by imposing on defendant, a corporation fully subject to suit, a duty violation of which gives rise to a cause of action for damages. Doctrines applicable to regulatory agencies are not available to defendant; the President is not a necessary party.

The Court below dismissed the claim for damages upon the further ground that "we find no evidence of a congressional intent to allow recovery of overcharges" (R. 257).

Plaintiffs submit that Congress by creating between ship-owners and defendant legal relationships under which well-settled principles accord a right of damages when duty is breached showed an intent to allow such recovery.

That public corporations subject to suit have all the liabilities of private corporations, except as to execution, has been settled by numerous decisions of this Court. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

[Plaintiffs recognize that the consent by the United States to suit respecting defendant's affairs does not carry with it a consent to execution. *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen;* 43 F. 2d 705 (C. A. 2d). At present all that plaintiffs ask respecting damages is that this Court hold that the complaint states a cause of action.]

With respect to defendant, we know that the 81st Congress specifically intended, by adoption of the Act of July 16, 1949, that it "should be subject to suit on *all* claims, tort as well as contract, in the *same* manner as any *private* corporation." *Supra* pp. 90-91.

A little more than a year later the same Congress, by the Act of September 26, 1950, authorized the transfer of the Canal to defendant, an "agency" thus made subject to suit "like any private corporation," imposed upon defendant the duty to prescribe tolls according to the Section 412 formula, and made that duty "effective" upon the transfer, an event that occurred July 1, 1951 (16 F. R. 6333) (Sections 10, 11, 12 and 14 of the Act of 1950, Appendix A, 5a-8a).

Also, by Section 12 of the Act of 1950 enacting Section 412(d), Congress incorporated in the laws of the United States applicable to defendant the provision of the Hay-Pauncefote Treaty requiring that "the Canal shall be free and open to the vessels of commerce" "of all nations" without "discrimination" and at "just and equitable" tolls and defined what was "just and equitable" by the Section 412 formula.

By simultaneously providing in the same Act for the transfer of the Canal to defendant, a corporation fully subject to suit, the nation's duty under the Treaty, whatever it might continue to be as a matter of international negotiation, arbitration or litigation, became enforceable as a matter of municipal law by suit against defendant in the courts of the United States.

The obligation to serve all customers without discrimination and at lawful rates is the classic characteristic of the public utility in Anglo-American law. *Munn* v. *Illinois*, 94 U. S. 113. As we show *infra* violation of that duty gives rise to a cause of action for damages.

This Court has frequently held that failure to comply with a statutory duty gives rise to a cause of action in favor of those injured by that failure. *Infra* pp. 191-192.

Here the reasoning of such decisions is further buttressed by the fact that the legal relationship between plaintiffs and defendant is of a kind that historically has warranted an action for damages when duty is breached.

Nor is exception made when the rate to be fixed is subject to approval by another.

Defendant, as a corporation with a duty to fix a reasonable rate, is liable for its failure to do so. When a public utility fails to perform its duty to fix a lawful and reasonable rate, the user may recover in the courts whatever excess has been charged. The principle has been most often declared, perhaps, in railroad cases.

In *Arizona Grocery Co. v. Atchison Ry. Co.*, 284 U. S. 370, this Court declared at p. 383:

> "The exaction of unreasonable rates by a public carrier was forbidden by the common law. . . . Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded."

In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, this Court said at p. 436:

> "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action for damages."

Cf. *Heiserman* v. *Burlington, C. R. & N. Ry. Co.*, 63 Iowa, 732; *Louisville etc. Ry. Co.* v. *Wilson*, 132 Ind. 517, 526; *Peters* v. *Railroad Co.*, 42 Ohio St. 275.

As noted *supra* p. 182 the measure of damages in the carrier cases is the difference between the rate charged and a reasonable rate.

The rule is, however, applied to public utilities generally. *Salt River Canal Co.* v. *Nielsen*, 10 Ariz. 9; *City of Chicago* v. *Northwestern Co.*, 218 Ill. 50 (municipal water system); *Winchester Turnpike Co.* v. *Croxton*, 98 Ky. 739. Cf. *Forbes Boat Line* v. *Board of Commissioners*, 77 Fla. 742, holding plaintiff shipping company entitled to recover from defendant, a state agency operating a canal, tolls exacted without authority in law. At 258 U. S. 338 this Court held unconstitutional a retroactive grant of authority by the Florida legislature.

And when, as in the *Winchester* and *Heiserman* cases, *supra*, the legislature defines what is reasonable, the user may recover any excess charged over the rate thus defined.

This principle continues to the present day despite the creation of regulatory commissions with power to make reparations findings. Thus, under Section 16(2) of the Interstate Commerce Act, the Commission's reparation order is merely a condition precedent to, and evidence in, the user's suit for damages for the excess over the lawful rate. *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Lewis Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660-661. Only the courts definitively adjudge relief.

The liability exists although a rate prescribed by defendant was not finally effective *per se*; the Section 411 requirements that the President approve and that the existing toll rate continue until changed according to law provide no defense. Defendant tries to hide behind the President—a somewhat presumptuous argument as defendant, unlawfully failing to act, deprived the President of an opportunity to function.

In any event the argument does not have force. When a rate is excessive failure to prescribe a new and lawful rate calls for damages, despite the fact that the new rate is subject to approval by an independent authority.

Thus under the Interstate Commerce Act a rate prescribed and filed by a carrier is subject to the approval of the Commission, Section 15(7), in the same way that defendant's rates are subject to the approval of the President.

In *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, this Court considered the carrier's failure, as to newsprint shipped from Ontario to New York City, to establish a reasonable rate on that part of the trip from the international boundary to New York. Holding the carrier liable for the damages thereby sustained, the Court said at p. 187:

> "It was the duty of defendants in error to establish just and reasonable rates for that service [from the boundary to New York]. . . Their breach of the statutory duty was a proximate cause of the losses complained of."

In *Lewis Co.* v. *Southern Pacific Co.*, 283 U. S. 654, another international rate case, this Court, holding the carrier liable, said at p. 663 that "the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the Act."

In neither of these cases was the carrier relieved of liability for its failure to establish a lawful rate, although any rate so established was subject to the approval of the Commission.

These cases are merely illustrative. It is obvious that under the procedures of the Interstate Commerce Act any reparation case necessarily involves a breach of duty to

establish a lawful rate, and of course all rates are subject to the approval of the Commission.

The proviso that the existing toll continue until changed according to law is similarly not a defense. That proviso merely specifies what the defendant must collect; it does not immunize a failure to establish a new and reasonable rate if circumstances call for its establishment.

Again the analogy to the Interstate Commerce Act is instructive. Under that Act the carrier is bound to charge the tariff rate, yet the carrier is not thereby exempt from liability if, due to its fault, the tariff rate is not a reasonable one. Hence a distinction is drawn between a "lawful" rate, which is the reasonable rate, the rate that should be charged, and the "legal" rate, which is the tariff rate and must be collected by the carrier. Damages have been awarded against carriers for charging the "legal" rate when it was excessive, although it was the rate required by law to be charged. In such a case, *L. & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, in upholding a reparation award, this Court noted at p. 234:

> "The tariff rate, although unlawful because excessive, was as between shipper and carrier, the only legal rate."

This principle is necessarily involved in all—or practically all—reparation cases, as the carrier necessarily charges the tariff, "legal" rate. But to protect the shipper it is necessary that reparations be awarded when that tariff rate is excessive. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442; *Arkansas Fuel Co.* v. *C. M. & St. P. Ry. Co.*, 16 I. C. C. 95, 97; *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. Co.*, 51 I. C. C. 635, 643, 648.

Defendant, as a public body with a duty to act, is liable for its failure to do so, although its action was not finally effective *per se*. It is well-settled that the citizen may recover damages suffered by reason of the failure of a public officer or body to perform a statutory duty. *Amy* v. *Supervisors*, 11 Wall. 136, 138; *Tracy* v. *Swartout*, 10 Pet. 79, 93; cf. *Robinson* v. *Chamberlain*, 49 N. Y. 389, 390, 394.

More particularly, a citizen entitled to mandatory relief against a public officer also receives damages caused by delay in the performance of that duty. *Dow* v. *Humbert*, 91 U. S. 294, specifically approving *People* v. *Supervisors*, 28 N. Y. 112.

If the courts deem it proper that a public officer respond individually, from his personal means, for damages suffered by reason of his failure to perform a statutory duty, how much more appropriate that damages be paid by a public body which has enriched itself to the extent of millions of dollars by such failure.

That prescription was subject to the approval of the President is not a defense. In most cases the public officer required to pay damages had full control of the administrative process in question. At least one case, however, relates to a public officer who did not have final power, but like defendant here, had the duty of initial action, final action to be taken by another agency. He was held liable. *Hupe* v. *Sommer*, 88 Kan. 561, was a suit by a contractor against a city official who had wrongfully refused to certify to the county clerk that the work under the contract had been satisfactorily completed. Under the statute the county clerk, upon receiving a certificate of completion, took final action in respect of payment. The Court said at pp. 564-565:

> "The petition also alleges that the defendant failed and refused to proceed as the law provides

> for the collection of the money and the payment of the plaintiff, and *failed and refused to put into operation the machinery provided by law* for the collection of taxes and moneys. . . . If the defendant, without sufficient excuse, refused to perform [his duties], *he inflicted a wrong upon the plaintiff; and should be liable for whatever loss was thereby occasioned.*"

This Court Has Recognized That Express Provision for Damages Is Not Necessary.

The principle of the public utility rate and administrative law cases that breach of duty gives rise to an action for damages despite the absence of express statutory provision for damages has been recognized by this Court in similar cases.

In *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, the Court considered a suit for damages suffered in an accident caused by defendant's failure to comply with the Safety Appliance Act. The Court said at p. 39:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the *damages* from the party in default is implied . . ."

In *Steele* v. *L. & N. R. Co.,* 323 U. S. 192, the Court considered a suit by several Negroes against a collective bargaining agent to forbid discrimination against them in the agent's negotiations with the employer. The agent had been chosen and functioned under the Railway Labor Act. The Court construed the Act to require the agent to act without discrimination. The Court then addressed itself to the contention that the Act made no provision for judicial relief and said at p. 207:

> "That right (that the agent act without discrimination) would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction . . . . We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of *injunction and award of damages* when appropriate for breach of that duty."

In view of the international aspects of this case, it is relevant that the Permanent Court of International Justice has taken the same view that breach of duty gives to damages. That Court has observed that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." *Chorzow Factory Case*, P. C. I. J. Series A No. 17, p. 29, an often cited case.

The Court below relied on *Montana-Dakota Co.* v. *Public Service Co.*, 341 U. S. 246, a five-to-four decision of this Court. But in that case the plaintiff had brought suit under the Federal Power Act, a statute which granted a third party regulatory agency, the Federal Power Commission, the power to prescribe future rates, but consciously and deliberately withheld the power to grant reparations. A majority of the Court concluded that under these circumstances a complaint alleging excess rates in the past did not state a cause of action under the Federal Power Act. (It is to be noted, however, that even the Federal Power Act permitted damages back to the institution of rate proceedings.) The complaint also alleged that the rates were fraudulent, but the Court found no

federal jurisdiction over that aspect of plaintiff's grievance. But here the case concerns a tort committed by the defendant of which the District Court, as a federal court, unquestionably had jurisdiction. 28 U. S. C. §1331, *supra* pp. 86-89.

Defendant may not avail itself of doctrines applicable to regulatory agencies. Defendant's Brief (141-142) cites various cases involving regulatory agencies for the proposition that the courts can not grant relief for excess charges collected in the past "where an administrative agency has been entrusted with the determination of rates". Defendant deduces that it is immune from liability for its unlawful failure to prescribe tolls.

But the cases which defendant cites involve agencies with the power to regulate other people's rates. Defendant has no such power; in so far as relevant here defendant has only the power "to maintain and operate the Panama Canal." Section 9 of the Act of 1950; Defendant's Brief, 166. Defendant has been entrusted only with the power to determine its own rates. Corporations with only that power have no immunity with respect to their failure to prescribe lawful rates.

In passing it might be said that in this connection defendant again misstates the doctrine of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 246. As the entire premise of defendant's argument is false we do not stop to correct that misstatement.

The President is not a necessary party. Defendant suggests that because tolls prescriptions are subject to the approval of the President he is a necessary party in respect of the claim for damages.

Plaintiffs are suing for the tort committed by defendant for breach of its duty to prescribe tolls, a breach by reason

of which plaintiffs have been deprived of the benefits of the statute and defendant has wrongfully enriched itself to the extent of many millions of dollars.

Plaintiffs seek no recovery from the President who has done nothing wrong and has been deprived of an opportunity to function by defendant's unlawful failure to act.

Under such circumstances the President is no more a necessary party than is the Interstate Commerce Commission in actions brought by shippers for damages caused by the failure of carriers to establish a lawful rate, such a rate, when filed, being subject to the approval of the Commission.

[A finding by the Commission is a prerequisite of such a suit, it is true, but that is because the purpose of the Interstate Commerce Act was to achieve uniformity of rates; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 246; cf. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59. The Act of 1950 had no such purpose, and uniformity is no problem in connection with Panama Canal rates.]

Again, to refer to cases involving public property, in which it appeared that Congress had authorized land grants subject to the approval of the Secretary of the Interior, the courts have regularly adjudicated controversies between rival claimants in suits to which the Secretary was not a party. The decisions in such cases have often turned on the ground that the Secretary had exercised his review power erroneously as a matter of law. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter. R. R. Co.*, 112 U. S. 720; *Daniels* v. *Wagner*, 237 U. S. 547; cf. *California* v. *Deseret Water Co.*, 243 U. S. 415.

The argument *supra* p. 180 respecting the necessity of the President as a party in review proceedings also applies here.

POINT III.

Failure to provide relief for excessive tolls collected in the past would reward concealment and obstruction, frustrate Congressional and Treaty intent, and give an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

Here the courts have, by hypothesis, adjudicated that defendant acted unlawfully in its obstinate refusal to fix tolls on the basis of Canal operations; moreover, defendant apparently realized that such was its legal duty and received frequent warnings to that effect, and defendant long aided its unlawful refusal by concealment effected by "ambiguous bookkeeping" (R. 249).

Almost seven years have passed since the new tolls policy became "effective" on July 1, 1951 according to the Congressional declaration (Section 14 of the Act of 1950; Appendix A, 8a). At least six months must pass after this Court's decision before a new rate can go into effect.

Almost a year ago the Court of Appeals ordered defendant to proceed; but this Court stayed the order because of the foreign relations impact of tolls (R. 261).

If there is to be no liability for past damages, then through the delay seemingly inherent in this type of litigation and its long hidden, persistent disobedience, defendant gains to the extent of tens of millions of dollars and the Congressional intent that the formula take effect July 1, 1951 is frustrated.

The United States is obligated by Treaty to charge just and equitable tolls. Congress by the Act of 1950 defined tolls in accordance with that Treaty. Part One, Point II,

supra pp. 42-43; brief *amicus curiae* of the United Kingdom. If damages are not awarded that Treaty obligation has not been met.

Our highest officials have in the last years urged forcefully and well that international waterways be governed by the rule of law and not by arbitrary executive power. Unfortunately foreign nations are not likely to give full weight to these fine pronouncements, reminiscent as they are of declarations made respecting Panama before we built the Canal, if our country permits a Government corporation suable on all claims arising under the laws and treaties of the United States to retain vast sums judicially declared to have been unlawfully levied upon the commerce of the world for many years.

Conclusion.

The summary judgment granted by the Court of Appeals should be affirmed. So much of its decision as denies the claim for damages should be reversed.

March 22, 1958.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

Act of June 29, 1948 (62 Stat. 1075-1077):

Section 2 of the Act of June 29, 1948, by enacting Section 245, Title 2, Canal Zone Code, declared defendant to be an "agency and instrumentality of the United States."

Section 2, by enacting Section 245, also provided that:

> "Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant both of the southern judicial district of New York and of the Canal Zone."

Section 2 also enacted Section 246 as follows:

> "246. INVESTMENT OF THE UNITED STATES.—(a) As of the beginning of business July 1, 1948, the corporation shall issue to the United States, and deliver to the Secretary of the Treasury, a receipt for $1 acknowledging the transfer to the corporation, under the provisions of section 251 of this title, of the net assets of the Panama Railroad Company, hereinafter referred to as the 'New York company', a corporation created by an act of the Legislature of the State of New York passed on April 7, 1849, as amended by an act of that legislature passed on April 12, 1855, and which is wholly owned by the United States, and such receipt shall be evidence of the ownership of the corporation by the United States of America. In its capacity as owner of the corporation, the United States shall be represented by the President of the United States or such officer of the

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United States as may be designated by him, hereinafter referred to as the 'stockholder'.

"(b) The amount of the receipt (referred to in paragraph (a) above) shall be increased by subsequent additional direct investments of the United States, in excess of repayments to the Treasury and extraordinary expenditures and losses applicable as offsets to such investments under the provisions of paragraph (d) of this section, due to (1) funds advanced to the corporation from the Treasury within such appropriations by the Congress as may from time to time be made to meet increased capital needs, and (2) transfers to the corporation from other Government agencies (or, conversely, decreased by transfers from the corporation to other Government agencies), pursuant to applicable provisions of law, of business enterprises, facilities, appurtenances, and other assets, less liabilities assumed in connection with such transfers. Transfers of properties and other assets from or to other Government agencies under clause (2) above shall be at such appropriate amount or amounts as shall be agreed upon between the corporation and the agencies concerned and approved by the Director of the Bureau of the Budget, and in the determination thereof due consideration shall be given to the cost and probable earning power of the transferred assets, or usable value to the transferee if clearly less than cost, and adequate provisions made for depreciation of properties and equipment, obsolete or otherwise unusable inventories, and other reasonably determinable shrinkages in values, and, insofar as practicable, there shall be excluded from such amount any por-

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tion of the value of the transferred property which is properly allocable to national defense. The board of directors shall certify to the Secretary of the Treasury the amount of each such transfer, the amount of any accumulated repayments to the Treasury or extraordinary expenditures or losses applicable as offsets to the amount of such transfer under the provisions of paragraph (d) of this section, and the effective date of the transfer.

"(c) In order to reimburse the Treasury, as nearly as possible, for the interest cost of the funds or other assets directly invested in the corporation, the corporation shall pay interest to the Treasury, at least annually, on the net direct investment of the Government in the corporation, as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein, at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost.

"(d) The corporation shall account for its surplus as follows: (1) The total net income from operations from and after 1904 (when the Government acquired control of the New York company), plus the undistributed net income prior to 1904, less (2) payments to the Treasury as dividends from and after 1904, not applied as offsets to direct capital contributions as described below, and less (3) extraordinary expenditures or losses incurred through directives based on national policy and not related to the operations of the corporation, not reimbursed through specific appropriations by the Congress, and not applied as offsets to direct capital contributions as described below. The corporation shall not be

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required to pay interest to the Treasury on any part of its surplus, as above defined."

Section 2, by enacting Section 247, declared defendant to be a corporation which "may sue and be sued in its corporate name."

Section 2 also enacted Section 253 as follows:

"253. PAYMENT OF EXCESS FUNDS INTO THE TREASURY. The board of directors shall have the power and duty to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such dividends shall be treated by the Treasury as miscellaneous receipts, but shall be treated on the books of the corporation as applicable to reduction of past or future direct Government capital contributions (as provided in section 246(d) of this title) in determining the base for interest payments required under section 246(c)."

Act of September 26, 1950 (64 Stat. 1038-1043):

SEC. 2. (a) Except as otherwise provided in, or where inconsistent with, the provisions of this Act—

(1) the terms 'the Panama Canal,' 'the Canal,' and 'the Canal authorities,' wherever appearing in the statutes of the United States and having reference, prospectively, to the agency heretofore known by those names, are amended to read 'the Canal Zone Government'; and

(2) the term 'the Panama Railroad Company' wherever appearing in the statutes of the United

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States and having reference, prospectively, to the corporation heretofore known by that name, is amended to read 'the Panama Canal Company'.

* * * * * * * *

SEC. 10. Article 3 of chapter 12 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by renumbering sections 255 and 256 of said title 2 as sections 257 and 258, respectively, and by adding, in said article 3, two new sections numbered 255 and 256 and reading as follows: * * *

"256. AUTHORIZATION FOR TRANSFER OF PANAMA CANAL TO CORPORATION.—The President is hereby authorized to transfer to the corporation the Panama Canal, together with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

SEC. 11. Section 411 of title 2 of the Canal Zone Code is amended to read as follows:

"411. AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for

the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

SEC. 12. Section 412 of title 2 of the Canal Zone Code, as amended by the Act of August 24, 1937 (ch. 752, 50 Stat. 750), is amended to read as follows:

"412. BASES OF TOLLS—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including

Appendix A

(Statutes Involved)

interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction. * * *"

* * * * * * *

Appendix A

(Statutes Involved)

SEC. 14. Except for section 256 of title 2 of the Canal Zone Code, as added by section 10 of this Act, this Act shall take effect upon the effective date of the transfer to the corporation, pursuant to the provisions of said section 256, of the Panama Canal together with the facilities and appurtenances related thereto.

Administrative Procedure Act (5 U. S. C. §1001, 1009):

By Section 10(a) "any person suffering legal wrong because of agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute" is "entitled to judicial review."

By Section 2(g) "agency action" is defined to include "failure to act."

By Section 10(b) "the form of proceeding" may be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction * * *) in any court of competent jurisdiction."

By Section 10(e) the Court "shall (A) compel agency action unlawfully withheld or unreasonably delayed."

Title 28, United States Code (Judicial Code), §1331:

§1331. *Federal question; amount in controversy.*

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Executive Order No. 10263 (16 F. R. 6333):

SECTION 1. There are hereby transferred to the Panama Railroad Company, a corporate agency and instru-

mentality of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Panama Canal Company, (a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, and (b) all other facilities, buildings, structures, and improvements whatsoever now maintained and operated by The Panama Canal, an independent agency of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: *Provided, however,* that there are excepted from such transfer the following-described facilities, buildings, structures, and improvements, situated on the Isthmus of Panama, which shall be for use and administration by the agency which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: . . .

Sec. 8. This order shall become effective on July 1, 1951.

APPENDIX B.

Prior Statutes Providing for the Prescription of Panama Canal Tolls.

There follow the successive statutes relating to the prescription of Panama Canal tolls. This historical review demonstrates a pattern by which the President was designated to prescribe tolls, but commanded to do so in accordance with a defined policy, a policy which afforded some administrative discretion.

Act of August 24, 1912 (37 Stat. 560, 562-3).

SECTION 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: *Provided,* That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States * * *

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents

per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents.

Act of June 15, 1914 (38 Stat. 385-6).

SECTION 1. That the second sentence in section five of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August twenty-fourth, nineteen hundred and twelve, which reads as follows: "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," be, and the same is hereby, repealed.

SECTION 2. That the third sentence of the third paragraph of said section of said Act be so amended as to read as follows: "When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three."

Act of June 19, 1934, Adopting the Canal Zone Code (48 Stat. 1122).

Title 2:

SECTION 411. *Authority of President to prescribe and change tolls.*—The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama

Canal, but no tolls when prescribed as above shall be changed unless six months' notice thereof is given by the President by proclamation.

SECTION 412. *Bases of tolls; maximum and minimum rates.*—Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce.

The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo.

When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article 19 of the convention between the United States and the Republic of Panama, entered into November 18, 1903.

If the tolls are not based upon net registered tonnage, they shall not exceed the equivalent of $1.25 per net registered ton as nearly as the same may be determined, nor be less than the equivalent of 75 cents per net registered ton.

The toll for each passenger shall not be more than $1.50.

Act of August 24, 1937, Amending Section 412, Title 2, of the Canal Zone Code (50 Stat. 750).

SECTION 412. *Bases of tolls, measurement rules; maximum and minimum rates.*—Tolls on merchant vessels, army and navy transports, colliers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the Rules for the Measurement of Vessels for the Panama Canal prescribed by the President and as may be modified by him from time to time by proclamation, and tolls on other floating craft shall be based on displace-

ment tonnage: *Provided,* That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and on vessels in ballast without passengers or cargo the rate may be less than the rate of tolls for vessels with passengers or cargo. In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger. The levy of tolls is subject to the provisions of article XIX of the convention between the United States of America and the Republic of Panama, entered into November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed March 30, 1922.

APPENDIX C.

The Report of the House Merchant Marine Committee on H. R. 8677, the Bill That Became the Act of September 26, 1950.

HOUSE OF REPRESENTATIVES

81st Congress) (Report
2d Session) (No. 2935

AUTHORIZING AND PROVIDING FOR THE MAINTENANCE AND OPERATION OF THE PANAMA CANAL BY THE PRESENT CORPORATE ADJUNCT OF THE PANAMA CANAL, AS RENAMED; TO RECONSTITUTE THE AGENCY CHARGED WITH THE CIVIL GOVERNMENT OF THE CANAL ZONE.

August 16, 1950.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. O'TOOLE, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H. R. 8677]

* * * The bill is designed to implement recommendations of the Bureau of the Budget and of the President with respect to the organization and operation of the Panama Canal.

* * * * * *

The recommendations contemplate (*a*) that in the organization of the Canal, transit and business functions should be separated from civil government functions; (*b*) that such transit and business functions should be operated on a business basis by the Panama Railroad Company, renamed the "Panama Canal Company," and that civil

Appendix C

(House Merchant Marine Report)

government functions (including health and sanitation) should be performed by "the Canal Zone government"; (*c*) that tolls for commercial ships should be related to transit costs, including interest on Government investment in the Canal and a fair share of the net cost of health, sanitation, and civil government; (*d*) that free transits of Government ships should be eliminated; and (*e*) that the net appropriated cost of operation of the "Canal Zone government" should be reimbursed to the Treasury by the corporation, such reimbursement being proportionately charged to the various corporate divisions (e. g., railroad, steamship, commissary, etc.) on an equitable basis.

As reported by your committee the bill would be confined to the recommendations of the Bureau of the Budget and of the President. • • • The net cost of Canal Zone civil government would be borne from appropriations which would be reimbursed to the Treasury by the Company currently, or where necessary, over a longer period. The Company, in turn, would allocate the net cost of the Canal Zone Government against each of the corporate divisions. • • •

The bill as introduced would require that in the determination of the share of the net cost of health, sanitation, and civil government to be borne by tolls, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated gross revenues of the corporation, exclusive of the cost of commodities resold and exclusive of revenues arising from transactions within the corporation or from transactions with the Canal Zone Government.

• • • • • •

Your committee is informed that the resulting allocation is expected currently to assess approximately an equal division of the expense of health, sanitation, and civil government between the transit division and other cor-

Appendix C

(House Merchant Marine Report)

porate divisions. While the method of allocation contained in the bill is not the only possible method, it has the merit of simplicity and on the basis of information furnished the committee produces a reasonable and practical result.

It is generally agreed that in calculating the toll rate there should be excluded from the capital base all investment in equipment and structures, of business operations which are not directly related to operation of the Canal, all health, sanitation, and civil government facilities and equipment. Capital of each corporate division should also be reduced by a proportionate share of past net corporate repayments to the Treasury in excess of government investment pursuant to the provisions of Public Law 808 (80th Cong.). After these exclusions there would remain an item of $129,000,000 of interest which, accrued during construction of the Canal, and the amount was added to the Canal accounts by administrative determination in 1932 and represents a computation of the amount of interest compounded at 3 percent on funds appropriated between 1904 and 1920.

There is precedent for the exclusion of interest during construction from the capital investment of the Canal upon which interest is to be charged against toll revenues. Such interest during construction is not included in the capital accounts of the Tennessee Valley Authority and rates for power sold by the Authority are not computed to recover it.

Your committee has amended the bill to exclude interest during construction from the capital base for interest to be included in the tolls base. Such exclusion is recommended not only because of precedent but as a just and reasonable recognition of the defense value of the Canal, and as an offset against the operations which have been conducted and which, to some extent, will be conducted in the future, without reimbursement, for the Military Establishment or others in the interest of the United States. The amount thus excluded approximates that which was found, pursuant

Appendix C

(House Merchant Marine Report)

to direction of a special Commission appointed by the Secretary of War in 1921, to represent the capital cost of the Canal allocable to defense. Your committee notes that, for the past 30 years, there has been much argument as to whether the Canal was constructed for defense or commercial needs. Your committee is of the opinion that exclusion of interest during construction from the corporation's toll base is a reasonable recognition of the Canal's defense value, and that such exclusion will obviate argument on this issue in the future.

Your Committee believes that legislation reorganizing the Panama Canal and establishing tolls policy has long been needed. Since it will require at least a year to effect the changes proposed by the bill it is recommended that this legislation be given early consideration.

APPENDIX D.

Defendant's Income Statement for the Year Ended June 30, 1950.

The following statement is quoted from p. 18 of defendant's annual report for the year ended June 30, 1950. It has been printed in order to show that at the time the Act of 1950 was under consideration defendant was reporting its income on an activity basis. The only unallocated expenses were retirement, injury and death payments.

	1950	1949
DIVISIONAL INCOME (—LOSS):		
Commissary	$ 504,920	$ 239,988
Steamship line	90,963	224,030
Railroad	—165,346	—219,338
Harbor Terminals	305,496	146,388
Coal plant	10,119	43,784
Hotels:		
Tivoli	93,476	72,528
Washington	—84,169	—70,578
Telephone system	10,179	15,738
	765,638	452,540
Less civil service retirement fund contributions and injury and death compensation payments	230,521	226,085
Net divisional income	535,117	226,455
OTHER INCOME:		
Gain on sale of land	111,540	—
Gain on write-off of unredeemed commissary coupons	42,750	—
Interest earned	580	640
	689,987	227,095
OTHER EXPENSES:		
Accelerated depreciation of trans-Isthmian cable	—	66,740
Fire loss, La Boca commissary	69,074	—
Steamship claim settlements and other expenses applicable to prior years	63,135	—
	132,209	66,740
NET INCOME FOR YEAR	557,778	160,355

Appendix D

(Defendant's Income Statement for the Year Ended June 30, 1950.)

	1950	1949
ACCUMULATED INCOME RETAINED AT BEGINNING OF YEAR	43,656,107	51,966,009
Add:		
Portion of accumulated dividends applied to the value of assets transferred from the Panama Canal, pursuant to section 246 of the Canal Zone Code (note 1)	232,182	—
Unused portion of reserve for rehabilitation of steamships	—	82,960
	44,446,067	52,209,324
Deduct:		
Dividends paid to U. S. Treasury	1,000,000	500,000
Obsolescence of railroad roadway and track	—	7,085,159
Depreciation of certain railroad and harbor terminal properties applicable to prior years	—	943,058
Value of dairy pastures abandoned	—	25,000
	1,000,000	8,553,217
ACCUMULATED INCOME RETAINED AT END OF YEAR (exhibit 1)	$43,446,067	$43,656,107

The notes following exhibit 2 are an integral part of this statement.

APPENDIX E.

Defendant's Budget Program for 1951; Description of Activities.

The following statement is quoted from pp. 572-573 of the President's Budget for the year ending June 30, 1951. This statement of defendant's activities in detail, is printed to show that defendant serves the Army, the Navy, the Air Force, other Government agencies on the Isthmus, the Republic of Panama and the public generally, as well as the Canal.

PANAMA RAILROAD COMPANY

[Submitted under the Government Corporation Control Act]

Analysis of Budget Programs

The operations of the Panama Railroad Company comprise seven distinct activities: (1) Railroad, (2) harbor terminal facilities, (3) telephone system, (4) Hotels Tivoli and Washington, (5) commissary division, (6) coaling plant, and (7) New York office and steamship line. Statements of income and expenses for each of these activities are presented as schedule B-1. . . .

Railroad.—The railroad comprises 50 miles of main line track between the cities of Panama and Colon, at the Pacific and Atlantic terminals of the Canal, and appurtenances such as freight and passenger stations and terminals, railroad yards, industrial trackage, and the rolling stock. The railroad serves The Panama Canal, the United States Army, Navy, and Air Force, and other Government agencies on the Isthmus, and also performs the functions of a common carrier in meeting the needs of the Republic of Panama, and commercial agencies transacting business in this area. . . .

Harbor terminal facilities.—The harbor terminal facilities consist of docks, piers, and appurtenances necessary

Appendix E

(Defendant's Budget Program for 1951; Description of Activities)

for handling, transferring, stevedoring, and storing cargo arriving at the Canal Zone ports of Cristobal and Balboa, either for ultimate destination in the Canal Zone or the Republic of Panama, or for transshipment to points beyond. . . .

Telephone system.—The telephone system provides telephone service for The Panama Canal and for the civilian communities in the Canal Zone. It also leases trunk lines, circuits, and duct space to the Departments of the Army and Navy and to the Government of Panama. . . .

Hotels Tivoli and Washington.—The Hotel Tivoli in Ancon is owned by The Panama Canal but operated by the Panama Railroad Company. The Hotel Washington in Colon is owned and operated by the Panama Railroad Company.

Both hotels are operated even when financial circumstances are unfavorable because of their status as essential adjuncts to The Panama Canal, or, more broadly speaking, to the United States Government in this area. . . .

Commissary division.—The commissary division provides food supplies, clothing, and other essential requirements to Government employees and their families, to establishments of the United States Government located on the Isthmus, and to commercial shipping. In addition to retail stores in Canal Zone communities, the division operates large dry- and cold-storage plants, a bakery, an ice-cream and milk-bottling plant, an industrial laboratory, an ice plant, an abattoir, and a coffee-roasting plant, primarily as processing plants to supply its retail stores. It also operates the Mindi dairy on the Atlantic side and the Ancon laundry on the Pacific side. . . .

Appendix E

(Defendant's Budget Program for 1951; Description of Activities)

Coaling plant.—The Panama Railroad Company operates a coaling plant at Cristobal to supply coal to shipping calling at that Atlantic port. In addition to selling coal, the plant derives revenue from vessels docking at the plant pier but not taking coal. . . .

New York office and steamship line.—The New York office of the Panama Railroad Company is the main office of the Company in the United States. It has direct supervision over and responsibility for the operation of the steamship service and facilities in connection therewith; for the transportation of supplies, material, equipment, and personnel to the Canal Zone; the operation of a commissary purchasing department, and the necessary accounting required in connection with those activities. . . .

Appendix E

Defendant's Budget Program for 1951; Statements of Income and Expense.

This statement is printed in order to show that at the time the Act of 1950 was under consideration by Congress defendant budgeted its income and expense on an activity basis, with administrative expense, the only general expense payable at that time, distributed to each activity. The statement is taken from pp. 158-163 of the President's Budget for 1951.

SCHEDULE B-1.—Panama Railroad Company: Comparative Statement of Income and Expenses by Activities

[Fiscal years ending June 30, 1949, 1950, and 1951]

	1949 actual		1950 estimate		1951 estimate	
RAILROAD						
INCOME:						
Sales of services:						
Freight transportation	$1,465,293		$1,450,000		$1,450,000	
Passenger transportation	404,331		400,000		400,000	
Other transportation	100,779		95,000		95,000	
Other services	96,968		86,100		86,100	
Total sales of services		$2,067,371		$2,031,100		$2,031,100
Rents		38,912		38,900		38,900
Total income		2,106,283		2,070,000		2,070,000
EXPENSES:						
Direct operating costs:						
Maintenance of way	333,633		250,000		250,000	
Maintenance of equipment	552,290		483,000		440,400	
Transportation expenses	1,113,813		1,000,000		1,000,000	
Other expenses	42,066		37,800		36,000	
Total direct operating costs	2,041,802		1,770,800		1,726,400	
Pay increases	—	2,041,802	3,300	1,774,100	4,900	1,731,300
Administrative expenses	99,089		9,104,000		102,100	
Pay increases	—		2,300		3,400	
		99,089		106,300		105,500
Total expenses before depreciation		2,140,891		1,880,400		1,836,800
Depreciation		184,731		180,100		232,200
Total expenses		2,325,622		2,060,500		2,069,000
NET INCOME (OR LOSS (—))		—219,339		9,500		1,000

Appendix E

(Defendant's Budget Program for 1951; Statements of Income and Expense)

	1949 actual		1950 estimate		1951 estimate	
COMMISSARY						
INCOME:						
Sales of commodities	32,896,083		29,965,000		29,965,000	
Sales of services	35,682		35,000		35,000	
Total income		32,841,765		30,000,000		30,000,000
EXPENSES:						
Cost of commodities sold		27,743,925		24,201,500		24,250,300
Direct operating costs:						
Pay roll	3,064,203		3,285,200		3,322,400	
Merchandise loss and damage	256,835		265,000		265,000	
Local transportation of merchandise	307,985		305,000		305,000	
Other expenses	739,001		816,900		699,300	
Total direct operating costs	4,368,024		4,672,100		4,591,700	
Pay increases	—		29,800		44,700	
		4,368,024		4,701,900		4,636,400
Administrative expenses	312,213		344,300		337,400	
Pay increases	—		7,900		11,900	
		312,213		352,200		349,300
Total expenses before depreciation		32,424,162		29,255,600		29,236,000
Depreciation		141,271		144,400		164,000
Total expenses		32,565,433		29,400,000		29,400,000
Net income before adjustment of operating reserves		276,332		600,000		600,000
INCREASE (—) OR DECREASE IN OPERATING RESERVES:						
Reserve for employees' accrued leave		—30,767		—		—
Reserve for refrigerator guaranties		—5,577		—		—
Net adjustment of operating reserves		—36,344		—		—
NET INCOME		239,988		600,000		600,000

Appendix E

(Defendant's Budget Program for 1951; Statements of Income and Expense)

	1949 actual		1950 estimate		1951 estimate	
NEW YORK OFFICE AND STEAMSHIP LINE						
INCOME:						
Sales of services:						
Freight transportation	4,282,746		4,163,000		4,163,000	
Passenger transportation	974,396		1,050,000		1,050,000	
Baggage, mail and treasure	154,742		158,200		158,200	
Other services	36,128		39,300		39,300	
Total income		5,448,012		5,410,500		5,410,500
EXPENSES:						
Direct operating costs:						
Maintenance of ships	207,549		260,000		275,000	
Operation of ships	3,650,883		3,602,300		3,602,300	
Agency expenses	723,925		754,300		762,700	
Total direct operating costs	4,582,357		4,616,600		4,640,000	
Pay increases	—		5,400		8,000	
		4,582,357		4,622,000		4,648,000
Administrative expenses	158,859		165,500		170,900	
Pay increases	—		2,700		3,900	
		158,859		168,200		174,800
Total expenses before depreciation		4,741,216		4,790,200		4,822,800
Depreciation		482,766		476,900		476,900
Total expenses		5,223,982		5,267,100		5,299,700
NET INCOME		224,030		143,400		110,800

[Defendant's budget program for 1951 also budgeted the following activities: Harbor terminals, Hotels Tivoli and Washington, Telephone system and Coaling Plant. In each instance an allocated share of administrative expenses was shown as an item of expense.]

Appendix F

Defendant's Budget Program for 1952.

This statement, taken from defendant's first budget program after it acquired the Canal, is printed to show that defendant at that time, when the thinking of the legislative period was fresh in everyone's mind, assumed that administrative and general expenses would be distributed to each activity. The statement is taken from pp. 572-573 of the President's Budget for 1952.

PANAMA [RAILROAD] CANAL COMPANY

[Submitted under the Government Corporation Control Act]

PURPOSE AND FINANCIAL ORGANIZATION

The Panama Canal Company is a continuation of the Panama Railroad Company, a wholly owned Government corporation. . . .

The law authorizes the President to make the merger by transferring to the Corporation the Panama Canal and facilities and appurtenances related thereto. The President has announced his intention to make the transfer effective at the close of business June 30, 1951, and the Secretary of the Army and the Board of Directors of the Corporation are drafting plans to make the reorganization effective by that date. . . .

The value of the assets to be transferred to the Corporation at the time of the merger will be at such amounts as may be agreed upon between the Corporati n and the Panama Canal, subject to approval of the Di ector of the Bureau of the Budget. For the purpose of these estimates (in advance of the actual determination of the value of the assets), it is assumed for the purpose of the 1952 budget that the value of assets to be transferred from the present Panama Canal organization to the Corporation is approximately $498.5 million. Of this sum $12.9 million is esti-

Appendix F

(Defendant's Budget Program for 1952)

mated to be in the form of working capital and $485.6 million in the form of fixed assets. The portion of the latter which represents interest during construction, $129 million, is estimated to be an investment in the Corporation which will not be required to bear interest to the Treasury; the remainder of the investment transferred to the Corporation is to be interest bearing. . . .

ANALYSIS OF BUDGET PROGRAMS

Activity categories.—The operations of the Panama Canal Company will consist of a variety of activities which for budget purposes are tentatively grouped in three main categories: (1) Canal activities, (2) commercial activities, and (3) quarters.

The Canal activities will consist of those functions directly related to the waterway and handling of ships, such as the marine operation, maintenance of the Canal channel, locks, and other similar activities. The commercial activities will include all of the functions of the original Panama Railroad Company, plus many other service activities transferred from the Panama Canal, as indicated in schedule B 1. Quarters is an activity transferred from the Panama Canal, relating to the furnishing of housing.

An appropriate share of the administrative and general expenses, which in total are a joint cost of the Company and of the Canal Zone Government, is included in the expenses shown for most activities of the Company and in the expenses of the Canal Zone Government. . .

Rates used in income estimates.—The rates employed in estimating income during the fiscal year 1952 are not to be regarded as establishing the specific rate structures which will be adopted after the reorganization has been effected, but merely for a presentation of the budget program.

Appendix F

(Defendant's Budget Program for 1952)

When the plan of reorganization has been fully developed and approved by the President pursuant to law and the properties properly allocated to function and activity and their fair value fixed, the basis for determining equitable rates will be provided. Such revisions in rates as may then prove necessary will be adopted and announced. For example, the estimates for 1952 do not show the increase in income which will probably have to be obtained through higher rates or charges for services rendered, particularly for some of the commercial activities and quarters.

It is expected that the rates charged for the various activities will be carefully considered by the Board of Directors of the new Company and that appropriate changes will be made in the rates within the next year.

Canal activities.—The estimates are based on the assumption that the general level of business activities during fiscal year 1952 will be approximately at the July 1950 level. On this basis and at present rates, the gross income from operations of the Canal, including credits for the tolls of military ships, would be $26,131,000. Expenses are estimated to total $28,063,000 after deducting intra-agency transactions and after including $7,467,000 for interest on the Government's investment based on the preliminary evaluation of assets. With no change in rates, this would result in a deficit of $1,932,000. As indicated above, however, the actual determination of the properties and assets to be transferred to the Corporation which may affect the interest charge, will be made later. Also, the estimates of income projected for fiscal year 1952 are based upon the present volume of business and any increase would necessarily alter the situation concerning the deficit. The amounts shown should not be construed or be interpreted as intended to make any commitment as to any specific

Appendix F

(Defendant's Budget Program for 1952)

base for computation of canal tolls or as any determination of the exact rate which may finally be adopted. For the purpose of submission of this budget, however, a rate increase is projected, to be effective for the latter half of the fiscal year (allowing time for the Corporation to give due notice), which is estimated to produce $1,380,000 of additional income, thus bringing the deficit down to $552,000.

Commercial activities.—The gross income from commercial activities during the fiscal year 1952, exclusive of income from costs of commodities sold and intra-agency transactions, is estimated to be $19,936,000. Expenses, exclusive of costs of commodities sold and intra-agency transactions, are estimated at $22,335,000, including $2,384,000 as a proportion of Canal Zone Government expenses and $620,000 for interest payable to the United States Treasury. This indicates a net deficit from operations of $2,399,000. It may be entirely attributed to classifying interest and the proportionate cost of Canal Zone Government as expenses of commercial activities; before assignment of these two factors the operations would produce a net income of $605,000 to be applied toward payment of interest to the Treasury.

Appendix F

(Defendant's Budget Program for 1952)

Defendant's Budget for 1952; Statement of Income and Expense.

The statement is printed to show that in defendant's first budget after it acquired the Canal, all general expense, administrative expense, interest and cost of Canal Zone Government have been allocated to each activity. The statement is taken from pp. 574 and 575 of the President's Budget for 1952.

STATEMENT B.—Panama Canal Company: (Continuing the Panama Railroad Company)
Statement of Income and Expenses, and Analysis of Earned Surplus
[For fiscal years ending June 30, 1950, 1951, and 1952]

CANAL ACTIVITIES

	1950 actual	1951 estimate	1952 estimate	
INCOME:				
Sales of services:				
Tolls, at current rates	—	—	$22,400,000	
Anticipated income from increase in toll rates	—	—	1,280,000	
Other marine revenue and Canal services	—	—	1,731,000	
Total income before toll credits	—	—	25,411,000	
Credit for tolls on U. S. Government vessels:				
At current rates	—	—	2,000,000	
Income from increase in toll rates	—	—	100,000	
Total income and toll credits	—	—		$27,511,000
EXPENSES:				
Direct operating expenses	—	—	$14,963,000	
Administrative expenses	—	—	112,000	
General expenses	—	—	727,000	
Interest payable to U. S. Treasury	—	—	7,467,000	
Proportion of cost of Canal Zone Government	—	—	4,158,000	
Total expenses before depreciation and allotted share of loss on quarters	—	—	27,427,000	

Appendix F.

(Defendant's Budget Program for 1952)

	1950 actual		1951 estimate		1952 estimate	
Depreciation	—		—		1,418,000	
Allotted share of loss on quarters	—		—		118,000	
Total expenses		—		—		$28,963,000
Net income before adjustment of operating reserves		—		—		—1,452,000
Decrease in operating reserves		—		—		900,000
NET INCOME (OR LOSS (—)), CANAL ACTIVITIES		—		—		—552,000
COMMERCIAL ACTIVITIES						
INCOME:						
Sales of commodities	$25,231,843		$23,425,000		$22,791,000	
Sales of services	10,356,240		11,086,500		15,436,000	
Rents	42,326		42,900		14,000	
Other	154,870		520		1,000	
Total income		$35,785,279		$34,554,920		38,242,000
EXPENSES:						
Cost of commodities sold	20,309,743		19,020,800		18,306,000	
Direct operating expenses	13,111,863		12,990,900		15,847,000	
Administrative expenses	797,382		812,300		127,000	
General expenses	—		—		1,033,000	
Interest payable to U. S. Treasury	—		—		620,000	
Proportion of cost of Canal Zone Government	—		—		2,384,000	
Total expenses before depreciation and allotted share of loss on quarters	34,218,988		32,824,000		38,317,000	
Depreciation	1,053,732		1,230,000		2,064,000	
Allotted share of loss on quarters	—		—		200,000	
Total expenses		35,272,720		34,054,000		40,641,000
NET INCOME (OR LOSS (—)), BEFORE ADJUSTMENT OF OPERATING RESERVES		512,559		500,920		—2,300,000
Decrease in operating reserves		45,220		—		—
NET INCOME (OR LOSS (—)), COMMERCIAL ACTIVITIES		557,779		500,920		—2,300,000

Appendix F

(Defendant's Budget Program for 1952)

	1950 actual	1951 estimate	1952 estimate
QUARTERS			
INCOME: Rents	—	—	2,216,000
EXPENSES:			
Direct operating expenses	—	—	1,575,000
Administrative expenses	—	—	10,000
General expenses	—	—	41,000
Interest payable to U. S. Treasury	—	—	249,000
Proportion of cost of Canal Zone Government	—	—	312,000
Total expenses before depreciation	—	—	2,187,000
Depreciation	—	—	501,000
Total expenses	—	—	2,008,000

APPENDIX G

Schedule B-1 of Defendant's Budget for 1958.†

This statement is printed to show that, unlike those for the years 1952, 1953 and 1954, defendant's budget programs no longer allocate general expenses to its particular activities, in violation of the Government Corporation Control Act, 31 U. S. C. §847. The statement is taken from pp. 618-619 of the President's Budget for 1958. It appears on p. 34a that even direct expenses of housing, railroad, and power system now exceed the gross income of those activities.

SCHEDULE B-1.—Income and Expense, Canal and Allied Maritime Operations.

	1956 actual			1957 estimate			1958 estimate		
	Revenue	Net operating expense	Operating margin	Revenue	Net operating expense	Operating margin	Revenue	Net operating expense	Operating margin
Canal operations	$40,856,993	$16,138,275	$24,718,718	$41,353,000	$18,354,400	$22,998,600	$42,153,000	$18,374,500	$23,778,500
Other maritime operations:									
Vessel repair	1,912,871	1,673,470	239,401	1,642,500	1,428,100	214,400	1,654,400	1,440,000	214,400
Harbor terminals	4,720,757	3,391,481	1,329,276	4,520,000	3,545,000	975,000	4,540,000	3,623,100	916,900
Hotel Washington	137,248	122,885	14,363	118,900	115,100	3,800	56,900	56,700	200
Total, other maritime operations	6,770,876	5,187,836	1,583,040	6,281,400	5,088,200	1,193,200	6,251,300	5,119,800	1,131,500
Total, canal and other maritime operations[1]	47,627,869	21,326,111	26,301,758	47,634,400	23,442,600	24,191,800	48,404,300	23,494,300	24,910,000

[1] Excludes interdivisional sales and services: 1956, $2,962,091; 1957, $2,609,000; 1958, $2,799,700.

† The 1958 budget program was the last available when this Appendix was set up in type. The 1959 program (President's Budget, 551-555) is somewhat rearranged but again fails to allocate general expense to activities.

SCHEDULE B-2.—Income and Expense, Supporting Operations.

	1956 actual			1957 estimate			1958 estimate		
	Gross income	Gross operating expense	Operating margin	Gross income	Gross operating expense	Operating margin	Gross income	Gross operating expense	Operating margin
Employee services:									
United States rate housing	$ 2,080,040	$ 1,502,861	$ 577,179	$ 2,079,600	$ 1,558,900	$ 520,700	$ 2,042,400	$ 1,549,900	$ 492,500
Local rate housing	483,017	585,492	—102,475	568,200	600,800	—32,600	623,000	540,400	82,600
Service centers	3,495,899	3,407,088	88,811	2,743,500	2,719,500	24,000	2,214,200	2,209,200	5,000
Commissaries	25,904,013	25,124,907	779,106	20,400,000	20,019,500	380,500	13,760,000	13,560,000	200,000
Subtotal	31,962,969	30,620,348	1,342,621	25,791,300	24,898,700	892,600	18,639,600	17,859,500	780,100
Interdivisional sales and services	—2,519,503	—2,519,503	—	—2,043,700	—2,043,700	—	—1,661,200	—1,661,200	—
Undistributed costs, local rate housing, transferred to general corporate expenses	—	—102,475	102,475	—	—32,600	32,600	—	—	—
Total, employee services	29,443,466	27,998,370	1,445,096	23,747,600	22,822,400	925,200	16,978,400	16,198,300	780,100
Transportation and utilities services:									
Railroad	1,132,412	1,419,270	—286,858	887,000	1,371,000	—484,000	808,000	1,339,600	—531,600
Motor transportation	1,519,681	1,498,252	21,429	1,554,000	1,538,000	16,000	1,581,000	1,552,700	28,300
Steamship line	7,347,601	7,130,104	217,497	7,194,600	7,140,400	54,200	7,147,900	7,141,500	6,400
Power system	2,018,801	2,026,355	—7,554	2,386,200	2,274,300	111,900	2,616,300	2,537,900	78,400
Communications system	540,021	459,612	80,409	558,800	520,200	38,600	581,200	542,300	38,900
Water system	1,399,410	1,140,433	258,977	1,354,700	1,199,000	155,700	1,354,700	1,170,300	184,400
Subtotal	13,957,926	13,674,026	283,900	13,935,300	14,042,900	—107,600	14,089,100	14,284,300	—195,200
Interdivisional sales and services	—4,716,338	—4,716,338	—	—4,906,200	—4,906,200	—	—4,855,400	—4,855,400	—
Undistributed costs transferred to general corporate expenses:									
Railroad	—	—286,858	286,858	—	—484,000	484,000	—	—	—
Power system	—	—7,554	7,554	—	—	—	—	—	—
Total, transportation and utilities services	9,241,588	8,663,276	578,312	9,029,100	8,652,700	376,400	9,233,700	9,428,900	—195,200
Other supporting services:									
Tivoli guesthouse	322,239	318,281	3,958	295,800	295,000	800	284,300	283,800	500
Printing plant	337,110	331,837	5,273	328,100	351,600	—23,500	314,800	313,800	1,000
Grounds maintenance	948,450	924,557	23,893	983,900	961,600	22,300	977,500	954,500	23,000
Engineering and maintenance services	4,179,789	4,251,449	—71,660	4,444,300	4,359,600	84,700	4,654,300	4,552,700	101,600
Supply operations	3,093,301	2,680,627	412,674	2,638,200	2,391,600	246,600	2,440,500	2,264,700	175,800
Subtotal	8,880,889	8,506,751	374,138	8,690,300	8,359,400	330,900	8,671,400	8,369,500	301,900
Interdivisional sales and services	—5,936,758	—5,936,758	—	—6,004,200	—6,004,200	—	—6,120,100	—6,120,100	—
Undistributed costs and credits transferred to general corporate expenses:									
Printing plant	—	—	—	—	—23,500	23,500	—	—	—
Engineering and maintenance services	—	—71,660	71,660	—	—	—	—	—	—
Scrap operations	—	79,219	—79,219	—	73,000	—73,000	—	—	—
Total, other supporting services	2,944,131	2,577,552	366,579	2,686,100	2,404,700	281,400	2,551,300	2,249,400	301,900
Grand total, supporting operations	41,629,185	39,239,198	2,389,987	35,462,800	33,879,800	1,583,000	28,763,400	27,876,600	886,800

APPENDIX H.

1958 Budget Programs of Tennessee Valley Authority and Virgin Islands Corporation.

This statement is printed to show that other multi-activity Government corporations, such as the Tennessee Valley Authority and the Virgin Islands Corporation, continue to comply with the Government Corporation Control Act, 31 U. S. C. §847, by allocation of general expenses to particular activities. The statement relating to the Tennessee Valley Authority is taken from pp. 216-217 of the President's Budget for 1958; that relating to the Virgin Islands Corporation (p. 38a) from pp. 790-791.

1958 BUDGET PROGRAM OF TENNESSEE VALLEY AUTHORITY.†

Program Expense	1956 actual	1957 estimate	1958 estimate
Navigation, flood control, and power program:			
Navigation operations	230,011	248,000	254,000
Flood control operations	200,283	211,000	227,000
Multipurpose reservoir operations	1,953,085	2,263,000	2,327,000
Topographic mapping	—	—	315,000
Distribution of administrative and general expenses	178,603	197,000	221,000
Total navigation, flood control, and power program	2,561,982	2,919,000	3,344,000
Fertilizer, agricultural, and munitions program:			
Fertilizer and munitions development	2,233,921	2,584,000	—
Fertilizer, agricultural, and munitions development	—	—	2,904,000
Distribution of administrative and general expenses	87,842	96,000	112,000
Total fertilizer, agricultural, and munitions program	2,321,763	2,680,000	3,016,000

† The 1958 budget program was the last available when this Appendix was set up in type. The 1959 program (President's Budget, 185-191) indicates, although not so specifically, the allocation of general expenses.

Appendix H.

(1958 Budget Program of Tennessee Valley Authority)

	1956 actual	estimate 1957	1958 estimate
Watershed protection and improvement program:			
Watershed protection and improvement	—	—	1,061,000
Distribution of administrative and general expenses	—	—	68,000
Total watershed protection and improvement program	—	—	1,129,000
Resource development program:			
Resource development	382,211	1,150,000	—
Distribution of administrative and general expenses	31,484	90,000	—
Total resource development program	413,695	1,240,000	—
General service activities: Maintenance of bridges financed by others on TVA dams	3,735	8,000	8,000
Total program expense	5,301,175	6,847,000	7,497,000

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Appendix H.

(1958 Budget Program of Tennessee Valley Authority)

Program Expense	1956 actual	1957 estimate	1958 estimate
Navigation, flood control, and power program:			
Power operations	125,270,539	134,867,000	149,680,000
Multipurpose reservoir operations	1,626,854	1,814,000	1,857,000
Distribution of administrative and general expenses	1,444,845	1,585,000	1,612,000
Total navigation, flood control, and power program	128,342,238	138,266,000	153,149,000
Fertilizer, agricultural, and munitions program:			
Fertilizer and munitions development	14,741,056	15,772,000	—
Fertilizer, agricultural, and munitions development	—	—	15,317,000
Distribution of administrative and general expenses	303,726	324,000	325,000
Total fertilizer, agricultural, and munitions program	15,044,782	16,096,000	15,642,000
Resource development program:			
Resource development	573,318	—	—
Distribution of administrative and general expenses	47,227	—	—
Total resource development program	620,545	—	—
General service activities:			
Reimbursable services	3,304,329	2,193,000	1,745,000
Distribution of administrative and general expenses	26,393	27,000	26,000
Total general service activities	3,330,722	2,220,000	1,771,000
Total program expense	147,338,287	156,582,000	170,562,000

Appendix H.

1958 Budget Program of Virgin Islands Corporation.†

As explained on p. 35a, this statement is printed to show that other multi-activity Government corporations continue to allocate general expenses to activities in compliance with the Government Corporation Control Act, 31 U. S. C. §847.

VIRGIN ISLANDS CORPORATION

B. Statement of Income and Expense

	1956 actual	1957 estimate	1958 estimate
LOAN PROGRAM			
Income: Interest on loans	$ 1,200	$ 10,300	$ 16,300
Expense:			
Interest on borrowings from Treasury	510	4,900	7,700
Loan servicing expense	—	100	100
Allocation of administrative expense	100	900	1,300
Total expense	610	5,900	9,100
Net operating income (or loss (—)), loan program	590	4,400	7,200
SUGAR PROGRAM			
Income: Sales of sugar and molasses	1,654,006	1,578,600	1,485,700
Expense:			
Growing and harvesting:			
Cost of growing and harvesting	377,833	482,697	471,800
Increase or decrease (—) in sugarcane inventory	71,967	—7,497	—16,800
Allocation of administrative expense	28,457	26,500	26,400
Other expense	23,659	19,300	19,300
Interest on borrowings from Treasury	19,892	23,200	23,900
Depreciation	36,572	39,400	40,600
Total, growing and harvesting expense	558,380	583,600	565,200

† Cf. footnote, p. 35a. The 1959 program (President's Budget, 697) also allocates administrative expense to activities.

Appendix H.

(1958 Budget Program of Virgin Islands Corporation)

	1956 actual	1957 estimate	1958 estimate
Manufacturing, shipping, and selling:			
Sugarcane purchased	329,818	337,000	337,000
Manufacturing expense	518,473	488,300	443,300
Shipping and selling expense	191,722	211,100	199,000
Allocation of administrative expense	80,590	84,300	81,900
Other expense	82,212	61,500	59,800
Interest on borrowings from Treasury	69,122	74,100	74,200
Depreciation	127,084	125,600	126,000
Writeoff of accounts receivable	155	—	—
Increase or decrease (—) in allowance for losses on accounts receivable	—156	—	—
Total, manufacturing, shipping, and selling expense	1,399,020	1,381,900	1,321,200
Total expense, sugar program	1,957,400	1,965,500	1,886,400
Net operating loss (—)	—303,394	—386,900	—400,700
• • •	• • •		
POWER PROGRAM			
Income: Sales of power	611,765	690,000	725,700
Expense:			
Production	250,394	280,000	290,000
Distribution	48,760	44,000	37,000
Allocation of administrative expense	25,590	25,800	27,800
Other expense	89,123	93,000	95,000
Interest on borrowings from Treasury	35,573	46,600	56,900
Depreciation	77,218	95,000	105,000
Writeoff of accounts receivable	7,972	—	—
Decrease (—) in allowance for losses on accounts receivable	—7,672	—	—
Total expense	526,958	584,400	611,700
Net operating income	84,807	105,600	114,000

[The program for miscellaneous activities also included an item "allocation of administrative expense".]

APPENDIX I

Early Legislative History of the Act of September 26, 1950.

a. House Resolution 44, 81st Cong. 1st Sess., adopted February 28, 1949 (95 Cong. Rec. 1617)

Whereas it is the responsibility of the Congress of the United States to establish the policy to be followed in prescribing the tolls that shall be levied for the use of the Panama Canal; and

Whereas there have been substantial changes in economic conditions since Congress last established such policy, including the effect of such tolls upon American shipping: Therefore be it

---

Resolved, That the Committee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal with particular reference to the proper accounting and allocation of costs attributable to—

(a) the transit of the Canal by commercial, governmental, and military vessels of United States and foreign nations;

(b) military activities of the United States in and connected with the Canal Zone;

(c) United States civil government, including, but not limited to, sanitation, public schools, playgrounds, hospitals, and so forth;

(d) business operations conducted under the supervision of the Governor General of the Panama

Appendix I

(Early Legislative History of the Act of September 26, 1950)

Canal by the various business units of the Panama Canal and Panama Railroad Company;

and to recommend to the Congress concerning what elements of cost should be properly used in the future as the basis of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes.

Resolved, That the President of the United States be, and hereby is, requested to defer until after submission of the committee's report any change in tolls currently levied for the use of the Panama Canal.

b. Report of the House Committee on Merchant Marine and Fisheries, made August 23, 1949 (Report No. 1304, 81st Cong. 1st Sess.)

The Committee on Merchant Marine and Fisheries has adopted and ordered reported the following report on the investigation of Panama Canal tolls.

Pursuant to the authority conferred by House Resolution 44, Eighty-first Congress, a Special Subcommittee to Investigate Panama Canal tolls, conducted an investigation and made the following interim report:

Introduction

In the course of its deliberations, the special subcommittee appointed to consider the question of tolls on the Panama Canal has held numerous hearings and has visited the Canal Zone. Full consideration was given to the testimony of the shipping industry, the Association of American Railroads, the Governor of the Panama Canal and

Appendix I

(Early Legislative History: 1949 Report of House Committee)

members of his organization, and others whose experience qualified them to give expert testimony on the subject. Available records of the business operation of the Canal were carefully studied. Copies of the hearings are either available or will be made so in due course...

While the present question of increasing the tolls from 90 cents to $1 may not have assumed the proportions of a crisis in the public mind, it does approach that stage in the minds of the shipping people, and particularly the intercoastal operators. In any event, the effect of the increase is so far reaching in both national and international affairs as to merit the most careful study, and the most expert consideration.

Having reached this conclusion, the committee looked into the history of the present Presidential Proclamation No. 2775 of March 26, 1948. Apparently it started at a hearing before the Appropriations Committee which concerned the affairs of the Panama Canal in general. The Governor of the Panama Canal made a statement to the effect that costs were increasing and that the margin between costs and receipts from tolls was consequently shrinking. A committee member then remarked that in such a case, perhaps the tolls should be increased. There is no question that the available figures would seem to have indicated the reasonableness of this observation on the part of the committee member.

The fixing of rates and charges by transportation facilities is generally the subject of exhaustive and expert studies. However, in the present case the records indicate that the next step was a recommendation, drawn quite properly by the Washington office of the Panama Canal approved first by the Governor and then by the Secretary of the Army, and then placed on the President's desk.

Appendix 1

(Early Legislative History: 1949 Report of House Committee)

In the absence of any recommendations to the contrary, the President signed the proclamation and published it. This was followed by a vigorous protest on the part of the shipping interests, whereupon the effective date of the proclamation was changed from October 1, 1948, to April 1, 1949, in order to permit the introduction of House Resolution 44, and the consequent deliberations of this committee.

This resolution, among other things, requested the President to defer until after the submission of the committee's report, any change in tolls currently levied for the use of the Panama Canal. This request was granted, and the effective date of the proclamation now stands at September 1, 1949.

The steps by which the President's proclamation No. 2775 of March 26, 1948, was issued, present some very unusual characteristics.

It is strange that the fixing of tolls should be a responsibility of the President. However, it is so designated by the basic law of 1912, and it has remained so throughout the years. Periodically, therefore, the President faces the problem. Presumably he calls in such of his executive staff as may be suitable. These would include his executive assistants, the Bureau of the Budget, and others who may be readily accessible. However, at no place in the chain of events does there appear to have been consultation with any qualified rate-making authority.

However, the toll question is intimately linked to the administration, operation, and accounts of the Canal. The appropriate toll policy can hardly be decided upon and administered without business-type accounts, similar to those of public utilities, upon which to rely for the basic financial and operating data. The status of the Canal as

a business enterprise can be further clarified by making toll receipts available to it as operating revenues, returning interest to the Government at the going rate as provided for Government corporations. These purposes can be achieved in government only through the corporate and the accompanying business-type budget and commercial-type audit. It appears to the committee that in these days of reorganization, it is a most appropriate time to consider the extension of the corporate form of organization to the operation of all functions of the Panama Canal except those having to do primarily with national defense.

This conclusion is reached after study of the accounts of the Canal as reflected in various annual reports. Through these the committee tried to segregate the different operations into an orderly system and to separate those functions which should properly be charged or credited to the national defense system from those which pertain primarily to commercial operation. It is believed to be impossible to arrive at any satisfactory conclusion until the Canal functions have been placed either within the Panama Railroad Company or in a separate corporation with an appropriate type of accounting which segregates defense measures from commercial capital costs and operating expenses on the basis of appropriate legislative allocation.

c. Statement of Frazer Bailey to subcommittee on Panama Canal Tolls of the House Merchant Marine Committee on May 23, 1949 at hearings on H. Res. 44.

Mr. BAILEY. Mr. Chairman and gentlemen of the committee; my name is Frazer Bailey. I am president of the national Federation of American Shipping, who represent two-thirds of all the privately owned deep-water dry-cargo

Appendix I

(Early Legislative History: Statement of Frazer Bailey)

vessels under the American flag, and approximately one-half of the tanker fleet.

On February 28 the House of Representatives passed House Resolution 44. I will not take the committee's time to read it. You gentlemen, I know, are thoroughly familiar with it. It calls for a report by June 30 on the policy that should be used in the future in establishing and maintaining the toll system at Panama.

The passage of House Resolution 44 grew out of the fact that in response to a suggestion contained in the report of the Appropriations Committee on the Army civil functions appropriation bill for the fiscal year ending June 30, 1949, in the House of Representatives there was a suggestion that Panama Canal tolls should be increased, and as the Chairman said a moment ago, the question of an increase arose due to an increase in what appear to be the operating costs in the Canal Zone.

The President, in response to a recommendation from the Department of the Army, issued a proclamation, No. 2775, on March 26, 1948, increasing the applicable tolls from 90 cents to $1 per Panama Canal net ton for laden vessels. When this appropriation bill, H. R. 5524, was before the Senate, representatives of the shipping industry and Members of the Congress appeared before the Senate Appropriations Committee and pointed out that no testimony was made available to the Appropriations Committee of the House. They further testified as to the effect of such a tolls increase upon American shipping, the lack of justification therefor, and other matters relating to this subject.

The report of the Senate committee, No. 1167, of April 23, 1948, contained the following statement on the subject:

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(Early Legislative History: Statement of Frazer Bailey)

Shortly after the committee hearings, and prior to its publication, the committee was advised that the Department of the Army submitted to the Chief Executive a proclamation, which was signed by the Chief Executive, increasing Panama Canal tolls for laden vessels from 90 cents to $1 per ton, to become effective October 1, 1948.

In view of the additional information and evidence on this matter developed at the committee's hearings, which was not available to the House committee, the committee strongly urges that the proclamation increasing the Panama Canal tolls be reviewed, especially in the light of the adverse effect such an increase will have on American shipping.

On September 8, 1948, the President issued a proclamation in which he deferred the effective date of the toll increase previously authorized until April 1, 1949, and on March 14, 1949, the President again postponed the effective date of such a proposed increase in Panama Canal tolls by a similar proclamation until September 1, 1949.

In the President's proclamation on this subject he stated:

Whereas, by House Resolution 44 of the Eighty-first Congress adopted February 28, 1949, the Committee on Merchant Marine and Fisheries

(1) is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal, and to recommend to the Congress concerning what elements of cost should be properly used in the future as the basis of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes; and

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(Early Legislative History: Statement of Frazer Bailey)

(2) is directed to report its findings, together with its recommendations for such legislation as it may deem advisable to the House at the earliest practicable date, but not later than June 30, 1949; and

Whereas the President is requested by said resolution to defer until after submission of the committee's report any change in tolls currently levied for the use of the Panama Canal; and

Whereas it appears consistent with the public interest to postpone the effective date of the said Proclamation No. 2775 until September 1, 1949, so as to permit continuance of the present tolls until the Congress shall have had adequate opportunity for consideration of the committee's report.

The Federation greatly appreciates the opportunity of appearing before your committee to suggest what in its opinion would constitute a fair and equitable basis or policy to be followed in the future in establishing and levying tolls for the use of the Panama Canal for transit purposes.

My presentation is confined to the operation of the Canal as it presently exists.

The shipping interests which we represent believe that the Panama Canal should be placed upon a pay-as-you-go basis, after full consideration of its military and its commercial characteristics.

We do not believe that the American taxpayer should be called upon to provide funds for the operation of the Panama Canal for transit purposes. We believe the Canal should be self-sustaining from its toll receipts as to all expenses incurred in its operation for transit purposes.

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(Early Legislative History: Statement of Frazer Bailey)

For the reasons we will show, we believe there should be a recognition of the military value of the Canal in such a toll policy, and thereafter it should operate without profit and without loss.

We respectfully suggest to your committee for its consideration the following fundamental principles as a basis for a future toll policy of the Panama Canal:

(*a*) Recognizing that the Canal is a dual-purpose establishment for national defense and for commercial transits, and that no part of the cost of its construction or of its operation has heretofore been charged to national defense, we suggest that in the future the minimum contribution which may be equitably made on account of its national defense characteristics is that there should be no further charge for interest on capital provided for its construction or improvement by the United States Government.

(*b*) The future toll schedule at Panama should reflect rates sufficient to pay all operating expenses properly allocable to transit operation, including maintenance, depreciation of all expendable parts, and a proper charge for the expense of providing all facilities and services necessary to the operation of the Canal and for its employees and for their families.

(*c*) There should be no preference or exemption to toll computation for ships, but all ships of all types, commercial and military, of all nationalities, should be treated equally.

(*d*) In determining the allocation of expenses for multiple-purpose services, functions or facilities, such allocation to be upon the basis of one arbitrary one-half there-

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(Early Legislative History: Statement of Frazer Bailey)

for for some other logical division, such multiple services and facilities to include school, police, fire, physical education, libraries, license bureaus, civil affairs, hospitals, clinics, sanitation, highways, sewers, public buildings and grounds, office of paymaster and collector, accounting offices, offices in the United States, personnel administration, office of general counsel, and general correspondence and records, such arbitrary allocation being assumed to represent that portion of the services necessarily a part of the Canal operation and of its employees and their dependents as compared with the military and civil personnel who similarly use these services and these facilities.

The expenses of air terminals, post offices, quarantine and immigration, and cemeteries not to be charged against the operation of the Canal. We think it is obvious that they are public facilities furnished by all communities.

Any business functions operated by Canal personnel which perform at a profit to be credited against the operating expenses of the Canal in order to reach a net expense item.

(*e*) The rental charge paid to the Republic of Panama for the area represented by the Canal Zone, in an amount of $430,000 per year, should be allocated on the basis of the areas utilized for military purposes, for Canal purposes, and for other purposes.

The Panama Canal Zone is an area extending 5 miles on both sides of the Canal between the Atlantic and the Pacific. The land area is 372 square miles. It is used in part, 95 square miles, for defense installations of the Army, Navy, and Air Force, and 13.6 square miles for the operation of the Canal and ancillary activities. The remaining land is either assigned to cattle pastures, commercial licensees, forest preserves, swamps, and so forth.

APPENDIX J

PANAMA CANAL COMPANY

Statement of Source and Disposition of Funds
July 1, 1951 to June 30, 1957

($000 Omitted)

Statement prepared by plaintiffs' accountants from defendant's reports for fiscal years 1952-1957.

FUNDS PROVIDED:			
Income from operations		$20,156	
Add back non fund transactions:			
Depreciation (A)	$33,000		
Provision for overhaul of locks	6,264 (B)		
Amortization of slide hazard removal	600 (C)		
Total non-fund transactions		39,864	
Funds provided by operations		60,020	
Gain on sale of "SS. *Panama*"		4,272	
Decrease in inventories		7,693	
Increase in current liabilities		4,494	
Total Funds Provided			$76,479
DISPOSITION OF FUNDS:			
Dividends paid to U. S. Treasury		$15,000	
Acquisition of fixed plant (net of salvage) (A)		38,000	
Cost of overhaul of canal locks		4,105 (B)	
Cost of slide hazard removal		4,067 (C)	
Increase in notes receivable:			
Current	$1,070		
Long Term	3,208	4,278	
Increase in accounts receivable		818	
Increase in other current assets		124	
Increase in other assets and deferred charges		682	
Decrease in reserve for rehabilitation of commissary plant		750	
Transfers, adjustments and retirements affecting property accounts and related allowances for depreciation obsolescence and revaluation (net) (estimated)		102	
Total Disposition of Funds			67,926

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Provision for overhaul of locks	6,264 (B)		
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Transfers, adjustments and retirements affecting property accounts and related allowances for depreciation obsolescence and revaluation (net) (estimated)		102	
Total Disposition of Funds			67,926
Increase in Cash			$ 8,553

(A) Taken to the nearest $100,000 in accordance with pages 24-25 of 1957 report.

(B) Assumed that $1,080,800 provided for locks overhaul in fiscal year 1957, the same amount as in fiscal years 1954 and 1956.*

(C) Assumed that $200,000 of slide hazard cost amortized in fiscal year 1957, the same amount as in fiscal years 1955 and 1956.*

* Comment by counsel: The meager character of the information provided by the 1957 report is described in footnote 4, *supra* p.